

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI.

OCTOBER TERM, 1876, AT JEFFERSON CITY.

[CONTINUED FROM VOL. LXIII.]

WILLIAM PHILKIPS, ALEXANDER NIMICK, J. M. BAILEY, DAVID
BORLAND AND HUGH McDONALD, Appellees, *vs.* WALKER EVANS,
HORACE B. FLETCHER AND BYRD EVANS, Appellants.

1. *Judgment not set aside for error, dehors the record, when.*—A judgment may be set aside at any time within three years from date of its rendition for irregularity patent of record, but not after lapse of the term for matter *dehors* the record, as, on the ground that defendant was dead at the commencement of the action.
2. *Practice, civil—Bill of exchange—Record.*—A bill of exchange sued upon and filed with the petition constitutes no part of it.
3. *Bills of exchange—Ten per cent. damages, when allowable without protest.*—*Semble*, that in suit on a bill of exchange expressing value received and drawn without the state by plaintiff, the holder, on defendant—who is acceptor—within this State, damages at ten per cent. are allowable notwithstanding want of protest. (Wagn. Stat., 215, 216, § 8.)
4. *Judgment—Remittitur—Informality in—Reversal—Jeofails, stat. of.*—A mere informality in the *remittitur* by the lower court of an excess in the amount of judgment will not authorize a reversal of the cause. The lower court will on motion cause the formal entry to be made without a remandment for that purpose. (Wagn. Stat., 1034, § 6.)

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5. *Sheriff—Amendment of returns—Service—Omission of word "person"—Middle name of defendant.*—The recital in a sheriff's return served upon a "member of the family" etc. of defendant instead of upon a "person a member of the family" etc., or its insertion of the initial letter of a middle name when he has none, are immaterial, and may be amended. Amendments of returns are now authorized both by statute and an unbroken uniformity of decisions.
6. *Sheriff's return—Contradiction of—Amendment of—May be attacked in equity but not by motion.*—The return of an officer is conclusive as to the fact therein recited, except in an action for a false return. And on the same principle a proposed amendment to a return cannot be defeated by evidence contradicting such proposed amendment. Equity may interfere to prevent the perpetration of a fraud either by a consummated or by a contemplated amendment, but such interference cannot be invoked in aid of a motion.
7. *Practice, civil—Service of summons on member of the family.*—A return showing service of process on a defendant summoned subsequently to the first, by leaving a copy etc. with a "member of the family" (Wagn. Stat., 1007, § 7) is good.
8. *Executions—Two issued on same judgment and returnable to same term—Costs—Reversal.*—The mere fact that two executions are issued on the same judgment and returnable to the same term, where one is in fact returned before the issue of the other, and no harm will result save the costs of the additional issue, will furnish no ground for reversal.
9. *Practice, Supreme Court—Levy, mistake in—Appeal—Corrections—Reversal unnecessary, when.*—Where motion was made to quash the levy of an execution for the reason that the ground described therein was part only of that occupied by a building, and that sale under it would entail a ruinous sacrifice, and the case went up by appeal, it was held that as no sale had taken place under the levy, the circuit court should simply be directed to correct the error of description and that the cause need not be remanded for that purpose.

Appeal from Pettis County Circuit Court.

E. J. Smith, arguendo, cited: *Bollinger vs. Chouteau*, 20 Mo. 89; *Coleman vs. McAnulty*, 16 Mo. 173.

Huston & Bothwell, for Respondents, cited: *Coleman vs. McAnulty*, 16 Mo. 173; 19 Mo. 157; 1 Mo. 214; 39 Mo. 500; 46 Mo. 271; Wagn. Stat., 1872, 1034-5, §§ 3, 6, 7, 17; 20 Mo. 84; 43 Mo. 309; *Duncan vs. Matney*, 29 Mo. 369-76; *Harrison vs. Cachelin*, 36 Mo. 79-84.

SHERWOOD, Judge, delivered the opinion of the court.

Action on bill of exchange brought by plaintiffs under their firm name of Phillips, Nimick & Co., against defendants, sued as

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the firm of Evans, Fletcher & Co., and as the acceptors of the bill.

A writ of summons for defendants, Walker Evans, Horace B. Fletcher and Byrd Evans, was issued December 15, 1874, returnable to the January term, 1875, of said court. The original return on said writ was in the following words:

"Served the within summons by delivering a copy together with a copy of the annexed petition to H. B. Fletcher (he being first served), and also by leaving a copy with a white member of the family of Walker G. Evans, over the age of fifteen years, at his usual place of abode, all in Pettis county, Missouri, on the 19th day of December, 1874. Byrd Evans served by leaving a copy of the summons with a member of the family over the age of fifteen years, at his usual place of abode in Pettis county.

"L. S. MURRAY.

"Sheriff Pettis County, Mo.

"By S. W. RITCHIE, Deputy."

At the return term of the writ defendants failing to appear, were defaulted and judgment accordingly went for the sum claimed in the petition, together with ten per cent. damages in addition to ordinary interest, etc.

At the time of its rendition, on motion and affidavit, execution issued, returnable to the next May term, 1875. This execution seems to have been returned on February 17, 1875, the return showing but a trivial credit arising from the sale of iron, etc., being a balance after satisfaction of another execution. A second execution issued on the 26th of the last named month, returnable also to the next ensuing term.

At that time the defendants appeared and moved to set aside the judgment and quash the execution then in the hands of the officer, alleging as reasons that two of the plaintiffs in whose name the action was brought, and in whose favor the judgment was rendered and execution issued, were dead at the commencement of the action, to-wit: William Phillips and Alexander Nimicks; also, that there was no proper service of the summons on either Walker or Byrd Evans, so as to give the court jurisdiction over them and no appearance by either of them; also, because ten per

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cent. as damages on the amount of the bill of exchange sued on was included in the judgment, to which plaintiffs were not entitled; also, because there are two executions issued on the same judgment, directed to the same officer, and both returnable to the same term of the court, and the proceedings were then being had under the second one. On the hearing of said motion plaintiffs moved the court for leave for the sheriff to amend the return on the writ of summons, so as to show that the copy for Byrd Evans was left with a "white person," and that same was done December 19, 1874; to which defendants objected because if done it would make a false return and because it was asked in aid of a return already false in this: It is not true that said Byrd Evans had, on the 19th of December, 1874, or ever had his usual place of abode, or any place of abode, in Pettis county, Missouri, all of which defendants offered to prove. But the court would not permit defendants to prove said facts but allowed said amendments to be made. The return was amended accordingly and plaintiffs entered an informal remittitur for \$75, the amount wherein the judgment was to be alleged excessive in consequence of allowing ten per cent. damages. The motion to set aside and quash was overruled. Thereupon, defendants filed a motion to quash the levy and hold for naught the advertisement, and asking stay of the sale of the real estate so levied on, alleging as reasons that the property of defendants so levied on is a piece on Main street, in the city of Sedalia, 25 by 100 feet, entirely covered by a business house, and the sheriff has only levied on part of the same 20 by 100 feet and because said levy is uncertain, in that the property is levied on as the property of Evans and Fletcher, and the levy does not state which Evans, and the same is the common property of all the defendants, and because the same is true of the advertisement and because the advertisement does not follow the levy in this: The levy describes the beginning point as 21 feet 10½ inches west of S. E. corner of block 28, in Sedalia, and in the advertisement describes the same as 25 feet 10½ inches west from said S. E. corner of block 28. The levy was in the following words:

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"By virtue and authority of this writ I hereby levy upon and seize the following described real estate, to-wit: Beginning at a point on the north line of Main street, twenty-one feet ten and one-half inches (25 feet 10½ inches) in a westerly direction from southeast corner of block number twenty-eight (28) in the city of Sedalia, Missouri; thence in a northerly direction and at right angles to said Main street one hundred (100) feet; thence westerly and parallel, with said Main street twenty (20) feet; thence southerly and parallel with first line one hundred (100) feet; thence easterly on north line of Main street twenty-five (25) feet to place of beginning, being part of lots four (4) and five (5) in block 28 in the city of Sedalia, Missouri, as the property of Evans, Fletcher & Co., all in Pettis county, this 27th of February, 1875.

"L. S. MURRAY, Sheriff.

"By S. W. RITCHEY, Deputy."

The advertisement gave notice that said property was levied on and would be sold by virtue of the execution in this case, and one in favor of Wm. Clark & Co. against the same defendants, Evans, Fletcher & Evans, but declared that the same was levied on as the property of "Evans & Fletcher," and described the same as follows: "Beginning at a point on the north line of Main street twenty-five feet ten and one-half inches in a westerly direction from the southeast corner of block twenty-eight in the city of Sedalia, Missouri; thence in a northerly direction and at right angles to said Main street one hundred feet; thence westerly and parallel with said Main street twenty-five feet; thence southerly and parallel with first line one hundred feet; thence easterly on north line of Main street, twenty-five feet to place of beginning, being part of lots four and five in block twenty-eight, in Sedalia, Pettis county, Missouri." On the hearing of the motion, defendants read in evidence the execution, levy and notice of sale. It was admitted that the property of defendants so levied on was a piece of ground on Main street in the city of Sedalia, 25 by 100 feet, and entirely covered with a brick business house worth six thousand dollars, and that the same was owned in common by all the defendants. The court overruled the motion. And defendants

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having filed affidavit and bond, bring the case to this court by appeal.

I.

Although a judgment may for irregularity be set aside at any time within three years (Wagn. Stat., 1062, § 26), yet such irregularity must be one patent of record and cannot be shown by matter *dehors* the record. This renders evidence showing that two of the plaintiffs were dead at the commencement of the action entirely unimportant and inadmissible, and no error could have been committed had the absolute rejection of such evidence, instead of the reception of that of a contrary character, also occurred. After the term has passed, the court cannot be compelled to review the evidence upon which the judgment was given; and as the bill of exchange constituted no part of the petition, and as the amounts of the judgments did not exceed that claimed in petition, there was no apparent irregularity which could be the subject of a motion (Chambers vs. Carthel, 35 Mo. 374; Brackett vs. Brackett, 61 Mo. 221).

II.

But as the bill of exchange expresses value received and was drawn on persons within this State by the plaintiffs—the holders—without this State, but within the United States; and as defendants are acceptors, it would seem under the provisions of the statute (Wagn. Stat., 215, § 8), that ten per cent. damages are allowable—and this notwithstanding that no protest had occurred.

III.

Granting, however, that the amount of the judgment exceeded that prayed for in the petition, the alleged excess was remitted, and though this was informally done, any informality in this regard would not warrant a reversal, since the lower court, on its attention being called thereto, will cause the proper and formal entry to be made. Our statute of jeofails is specially applicable to informalities of this sort (Wagn. Stat., 1034, § 6; *Id.* 1036-7, §§ 19, 20). Errors, unless materially affecting the merits are not reversible errors (Wagn. Stat., 1067, § 33).

IV.

The amendment of returns is expressly authorized by legislative enactment (§ 6, *supra*, and § 17, 1035-6) and to the same effect is the now unbroken uniformity of our decisions (*Blaisdell vs. St. Bt. Wm. Pope*, 19 Mo. 157; *Corby vs. Burnes*, 36 Mo. 194; *Webster vs. Blount*, 39 Mo. 500; *Weber vs. Weber*, 49 Mo. 45), so that any defects in the return as originally made were cured by the amendment which the court allowed, and the objections that Walker Evans is not described as the defendant, or that he is designated as Walker G. Evans, or that the writ was not left with a person, are absolutely frivolous.

The middle letter is no part of the name. (*Smith vs. Ross*, 7 Mo. 463; *Franklin vs. Talmadge*, 5 Johns. 84; *State vs. Martin*, 10 Mo. 391). Its insertion or absence does not affect the question of identity one way or the other; and identity of name is *prima facie* identity of person (*State vs. Moore*, 61 Mo. 276, and *cas. cit.*), and "member of the family," &c., is equally effective a designation as though "person," &c., were used.

V.

The return of the officer is conclusive as to the facts therein recited, except in an action for a false return. (*Hallowell vs. Page*, 24 Mo. 590; *Dellinger's Adm. vs. Higgins*, 26 Mo. 180; *Reeves vs. Reeves*, 33 Mo. 28; *Jeffries vs. Wright*, 51 Mo. 215.) And the same reasons which would forbid any contradiction of the returns when made, must operate with equal and controlling potency in precluding evidence to show that a proposed amendment is untrue.

The action of the court below, therefore, in the rejection of evidence in the particular mentioned, will be held correct. The foregoing remarks are, however, to be restricted to purely legal proceedings. For the arm of a court of equity is not too short to throttle a fraud, consummated, or contemplated, having for its basis either a return originally false or one to be made so by a proposed amendment, and this is the view taken elsewhere. (*Walker vs. Robbins*, 14 How. [U. S.], 584; *Ridgeway vs. Bank of Tenn.*, 11 Humph., 523; *Freem. on Judg.* 5, 495.) But equitable interposition of this sort cannot be invoked in aid of a

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motion. (Hull vs. Sherwood, 59 Mo. 172.) And this shows in addition to the reason already urged, the correctness of the refusal to permit the falsity of the proposed amendment to be established.

VI.

The last objection made to the return in respect to service on Byrd Evans is equally futile as those already considered, relative to that on Walker Evans. Because the statute (Wagn. Stat., 599, § 60) provided that "the place where any person having no family shall generally lodge, shall be deemed the place of abode of such person," etc. But if the construction contended for by defendants be literally correct, that the writs should be left "with some white person of *his* family," then it must follow that constructive service on one "having no family," would be simply impossible.

VII.

In relation to the second execution, it certainly was irregularly issued, for the levy made thereunder could just as well have been made under the first. But inasmuch as the latter had been returned prior to the issuance of the second, no hurt could result to the defendants save by reason of the additional cost incident to such issuance, and this the trial court must see to if a sale takes place.

VIII.

If a sale had taken place under the levy, the consequences could not have been otherwise than injurious to the defendants. They are, it is conceded, owners in common of a piece of ground on Main street 25 by 100 feet, and this space is entirely covered by a brick business house worth \$6,000; but the levy does not embrace the whole house, but omits at least four feet in width—the entire length of the house. Under such circumstances it needs no argument to show that nothing short of a ruinous sacrifice could attend the sale. Courts should not permit their final process to be abused in this way. Since, however, no sale has taken place, and as mistakes in the levy and errors in the advertisement can be corrected before a sale does occur, we shall not reverse on that account, but while affirming the judgment direct the court below to have proper corrections made.

Judge Napton absent; the other judges concur.

Mentzing v. Pac. R. R. Co.

JOHN M. MENTZING, Respondent, *vs.* PACIFIC R. R. Co., Appellant.

1. *Practice, Supreme Court—Exceptions, bill of—Vacation.*—Unless on consent of parties made matter of record, the circuit court cannot grant permission to file a bill of exceptions in vacation.

Appeal from Jackson Special Law and Equity Court.

A bill of exceptions in this case, it appears, was signed and filed but in vacation and without consent of respondent.

Ewing, Smith & Pope, for Appellant.

W. E. Sheffield, for Respondent, cited: *Blankenship vs. North Mo. R. R. Co.*, 48 Mo. 376; *Ellis vs. Andrews*, 25 Mo. 327; *Wilcoxson vs. McBride*, 23 Mo. 404; *Diepenbrock vs. Shaw*, 21 Mo. 122; *Sutter vs. Street*, 21 Mo. 157; *State vs. McO'Blenis*, 21 Mo. 272.

SHERWOOD, Judge, delivered the opinion of the court.

Action for damages for killing an ox and judgment for \$60, the amount claimed.

It is impossible for us to review the alleged error of the circuit court in affirming the judgment of the justice since there is no bill of exceptions here. We have in numerous instances held, that unless upon consent of parties made matter of record, this court could not grant permission to file a bill of exceptions in vacation. In the present instance such consent does not appear and in conformity to previous rulings, (*Blankenship vs. N. M. R. R. Co.*, 40 Mo. 376; *West vs. Fowler*, 55 Mo. 300; *West vs. Fowler*, 59 Mo. 40; *Ellis vs. Andrews*, 25 Mo. 327; *Pomeroy vs. Selmes*, 8 Mo. 521; *Consant vs. Sidell*, 7 Mo. 250; *Hassinger vs. Pye*, 10 Mo. 156; *Diepenbrock vs. Shaw*, 21 Mo. 122; *Sutter vs. Street*, Id. 157; *State vs. McO'Blenis*, Id. 272; *Fanor vs. Finney*, Id. 569; *Ruble vs. Thomasson*, 20 Mo. 263; *Wilcoxson vs. McBride*, 23 Mo. 404), inasmuch as no error appears on the face of the record proper, the judgment must be affirmed; all the judges concur, except Judge Hough not sitting.

State v. Thompson.

STATE *ex rel.* ROBERT HUMPHRIES, Respondent, *vs.* JAMES THOMPSON, Appellant.

1. *Public schools—Warrant for wages of teacher in colored schools payable out of teachers' fund—School law of 1874—Construction of.*—The public school law of 1874 (see Adj. Sess. Acts 1874, p. 147, compare §§ 28, 29, 43, 63, 73, 85, 86, and 90), properly understood, does not create a separate fund for the support of colored schools, upon which warrants for the payment of teachers of such schools must be drawn. But warrants for the payment of teachers of both white and colored schools of the same district are properly drawn upon the teachers' fund of said district.

Under a proper construction of § 90, it was simply intended to provide that the money raised by taxation for building purposes could be applied only to that purpose, and that the money raised by taxation for other purposes could not be paid out for building.

Appeal from Cooper County Circuit Court.

Draffin & Williams, for Appellant.

I. The law creates a separate fund to be raised by taxation upon the township (and not upon the district), for the support of colored schools. It is a township charge, and the funds of the district cannot be legally used for its support. (See Sess. Acts of 1874, p. 163, § 73; also p. 168, § 90.)

McMillan Brothers, for Respondent.

I. The only fund on which relator's warrant could be drawn was the teachers' fund (Act 1874, p. 154, §§ 28 and 29). The law nowhere contemplates a colored school fund raised by taxation.

It can make no difference that the treasurer may have kept the money arising from the township taxation for colored schools separate from other school moneys, and that this fund was exhausted. He had no right so to do. It belonged to the school fund of the district; and such fund was not the only one that could be paid out for colored school purposes.

NORTON, Judge, delivered the opinion of the court.

This is a proceeding by mandamus, instituted in the Cooper county circuit court, to compel defendant, treasurer of said county, to pay a warrant drawn upon him by the president and clerk of school district number two, township 48, range 15, in

favor of relator for services as teacher in said district, for the sum of sixteen dollars and forty cents, and payable out of the teachers' fund of said district. The defendant in his answer to the alternative writ alleges as a reason for the non-payment of the warrant, that the services for which it was drawn were performed by the relator as a teacher of a colored school, that the township fund provided by law for the support of such school had been exhausted, that he could not legally pay it out of the teachers' fund of the district, that the warrant was intended to have been drawn on the colored school fund of the township, and that he did not have any money in his hands applicable to its payment.

The allegations of the return were denied by replication and on the trial of the cause a peremptory writ was awarded against the defendant.

The cause was submitted to the court below on an agreed statement of facts substantially as follows: "For the purposes of this proceeding it is admitted that said warrant was drawn by the legally constituted authorities of said school district upon respondent as county treasurer and treasurer of the school funds of said district; that the relator was the teacher of a colored school in said district, and that the warrant in question was given him for services as teacher of said colored school; that at the time of the presentation of said warrant for payment he did not have, nor has he now, any money in the treasury raised by the township of which said district is a part, for the support of colored schools, but that the same has been exhausted, nor any money set apart for the support of colored schools of said district, but that he has now and did have money belonging to the teachers' fund and raised by taxation on said district."

The question then submitted to the court is, whether the law creates a separate fund for the support of colored schools, upon which all warrants for the payment of teachers of colored schools shall be drawn, or whether warrants for the payment of teachers of white and colored schools in the same district shall be drawn upon "the teachers' fund" of said district. Section 85 of the acts of 1874, pages 166-7, provides that the State superintendent shall annually apportion the public school fund applied for the

benefit of public schools, among the different counties, upon the enumeration and returns made to his office, and shall certify the amount, so apportioned, to the State auditor, also to the county clerk of each county, stating from what sources the same is derived, which said sum the county treasurers shall retain in their respective county treasuries from the State funds; and the county clerks shall annually and immediately after their annual settlement with the county treasurer of their respective counties, proceed to apportion, according to the enumeration and returns in their offices, the school funds for their respective counties. In making such distribution, each county clerk shall apportion all moneys collected on the tax duplicate of any district, for the use of schools to such district; all money received from the State treasurer, and all moneys on account of interest of the funds accruing from the sale of sixteenth sections, to the district schools in Congressional townships or parts of townships to which such lands belong, and all other moneys for the use of schools in the county and not otherwise appropriated by law, to the proper district; and shall enter the apportionment so made in a book kept for that purpose, and shall furnish the district clerks, each, with a copy of said apportionment, and order the county treasurer to place such amount to the credit of the district entitled to receive the same. The 86th section of the school law provides that the county clerk shall collect or cause to be collected the fines and penalties, and all other monies for school purposes, and pay the same over to the county treasurer on account of the public school fund.

Under the operation of the above sections all the money applicable to the maintenance of public schools is distributed, and the amounts due from the various county treasurers to the respective school districts in each county of the State ascertained. These amounts, thus ascertained and credited by the county treasurers to the respective districts of their respective counties, can only be disbursed upon warrants drawn by the district clerk, upon the order of the board of directors, for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a school house. All warrants for wages of teacher must be drawn on the teachers' fund.

It is insisted by counsel for defendant, that, inasmuch as section 73 of the school law provides for the establishment of separate schools for colored children in any district where the whole number, by enumeration, exceeds fifteen, and provides that the tax for the maintenance of such schools shall be levied on the taxable property of the township in which such school is located, the legislature contemplated and intended to constitute a separate fund for the payment of teachers of colored children, distinct from the fund for the payment of teachers of white children. Reading this section in connection with sections 28, 29, 85, and 65 we do not think that such was the intention of the legislature. The only effect of section 73 is to provide that colored children shall be taught in separate schools from white children, and the legislature, recognizing the fact that the support of such schools might be too heavy a charge on the district, required that the burden, to some extent, should be borne by the township, and hence a tax for their maintenance is authorized to be imposed on the taxable property of the township. This tax, as well as the tax imposed upon the district, when collected is paid into the county treasury and the treasurer is required by section 85 to credit each district with the amount to which it is entitled, and it thus becomes the money of the district and is to be disbursed as provided in section 28.

The teachers of colored schools are employed by the directors of the district and the compensation to be paid them becomes a debt of the district, and to it alone can such teachers look for payment, and the board of directors could only order for that purpose the district clerk to draw a warrant on the teachers' fund in the hands of the treasurer applicable to the payment of teachers in the district. This fund is made up of the income of State, county, and township funds (which under the terms of the law can only be applied to the payment of teachers), and the tax imposed for that purpose whether it be district or township tax.

If the warrant in question had been drawn on the "colored teachers' fund" as is contended by counsel it should have been, the county treasurer might well have hesitated to pay it, on the ground that the law recognized no such fund.

The legislature have, neither in terms nor by necessary intentment, provided that the tax, provided for the support of colored schools, shall be kept distinct from the funds of the district.

The intention of the legislature to require these funds to be kept separate it is said, may be derived from the language employed in section 90, viz: "that all monies arising from taxation shall be paid out only for the purposes for which they were levied." Section sixty-five provides that the directors may levy a tax, first, for building purposes; second, a tax for all other purposes. We think a proper construction of section ninety is that it simply intended to provide that the money raised by taxation for building purposes could only be applied to that purpose, and that the money raised by taxation for other purposes than building could not be paid out for building purposes.

If the legislature had intended the funds for the support of colored schools to be kept as a separate and distinct fund it would have been an easy matter for them to have said so and made proper provisions to have accomplished the end. It has not been so expressed in the law, either in terms nor by necessary intentment.

The judgment is affirmed, all the other judges concur.

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THE STATE OF MISSOURI *ex rel.* THE ST. LOUIS, C. B. & Q. R. R. Co., Appellant, *vs.* THE COUNTY COURT OF DAVIESS COUNTY, Respondent.

1. *Subscription to railroad on condition as to location of road and depot—Non-fulfilment of condition on subsequent request of inhabitants, etc.*—Where the inhabitants of a township vote for subscription to a railroad on condition that the road shall be constructed and its depot built within a mile of a certain town, it is no excuse for non-compliance by the company with that condition that the non-performance was "at the request and desire" of the inhabitants of the town.

The power of the voters is merely statutory and exhausts itself at the polls on the day of election. And any subsequent action on their part would have no legal validity. And *a fortiori* the request of a portion of the inhabitants of the township is no excuse for such failure.

State v. County Court of Daviess County.

Appeal from Clinton Circuit Court.

Clark & Wait, for Relator.

Wm. M. Rush, for Respondent, cited: *State ex rel. Neal vs. Salem Co. Court*, 48 Mo. 390; *State ex rel. L. & St. L. R. R. vs. Salem Co. Court*, 45 Mo. 242; *Sto. Ag.* §§ 165-199, 200, 307.

SHERWOOD, Judge, delivered the opinion of the court.

The return to the alternative writ of mandamus, among other reasons why bonds in the name of the county and on behalf of Benton township should not issue to relator for the construction of its road through that township, alleged that relator had not complied with the condition upon which the subscription was made in this: that relator failed to construct its road, or build its depot, within one mile of the town of Pattonsburg.

The non-compliance with the conditions was admitted in the reply, but relator attempted to excuse its failure on the ground that such failure was induced in consequence of, and "at the request and desire" of, the inhabitants of Pattonsburg.

It is obvious that this could constitute no valid excuse for the non-performance of the conditions which were the basis of the subscription. For the power of the voters of a township is purely statutory, and exhausts itself when such voters give expression at the polls to their assent to or dissent from the proposed subscription. Any subsequent action on their part therefore, being unknown to the law, is possessed of no legal validity and can by no means absolve the railroad company from the conditions which were imposed at the time the vote to subscribe was taken. And if such results must attend the after action of the voters of the township, most assuredly no greater effect could be produced in favor of the railroad company by the "request and desire" of a portion of the inhabitants of the given township. Since, then, one of the chief essentials of the subscription made by Benton township has not been performed, it was no part of the duty of the county court to depart from the conditions which had been imposed, and issue bonds in violation of those conditions.

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This view renders unnecessary an examination into numerous other points raised and discussed, and leads to an affirmance of the ruling of the lower court in its denial of the peremptory writ.

The other judges concur.

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WM. H. LEONARD, Respondent, vs. JAS. D. COX, Appellant.

1. *Appraisement—Limitation as to time of completing—Waiver of.*—Where a party consents to an adjournment of the hearing of an appraisement until after the time fixed by the agreement for completing it, and at the adjourned session appears before the appraisers and offers testimony, the limitation as to time of finishing the appraisement is waived.
2. *Appraisers, partiality of will authorize vacation of award.*—The partiality of appraisers will authorize the vacation of an award.
3. *Arbitration—Choice of third arbitrator at commencement of proceedings.*—It is well settled, that in cases of submission to arbitration providing for the selection of an umpire in the event of a disagreement of the arbitrators, they may select the umpire before they enter upon the consideration of the subjects submitted.
4. *Arbitration—What agreement not a submission under the statute—Pleading—Suit on appraisement improper, when—Fault not material, when.*—A written agreement to surrender a leasehold at a certain time, for such sum as appraisers chosen for that purpose may determine it to be worth, is not a submission to arbitration within the meaning of the statute, but merely a contract for sale, the price to be fixed by third persons. And suit is properly brought on the contract of sale for the price so claimed, and not on the appraisement itself. Although the plaintiff declared specially on the contract for the amount of the appraisement, and the cause was tried as though the petition contained the common counts only, yet as the value of the property as found by the jury differed from the amount of the appraisement by an inconsiderable sum, and the defendant admitted his liability for the value of the property, substantial justice having been done, the judgment will not be reversed for such irregularity in the proceedings.

Appeal from Johnson Circuit Court.

R. C. McBeth, for Appellant.

LaDue & Fyke, for Respondent, cited: *Zallee vs. The La-
clede Mut. Fire & Marine Ins. Co.*, 44 Mo. 531; *Garred vs.
Doniphan*, 10 Mo. 161; *Curry vs. Lackey*, 35 Mo. 389.

HOUGH, Judge, delivered the opinion of the court.

On the 1st of May, 1872, the defendant, Cox, leased his farm in Henry county to the plaintiff, Leonard, until March 1st, 1873. On the 6th day of July, 1872, they entered into an agreement in writing, in pursuance of which one room in the farmhouse on the premises rented, and all the land not cultivated by Leonard, were on that day restored to the possession of Cox, and by the further terms of which the remainder of the leased premises should be surrendered to Cox by the 15th day of September, 1872, he agreeing to pay for said surrender such sum as two disinterested and experienced farmers selected by the parties should determine Leonard's rights under the lease, and his interest in the growing crop, to be worth; and in the event the two persons thus selected should fail to agree, they were to call to their aid a third person having like qualifications with themselves, and the price fixed by a majority of them was to be paid by Cox to Leonard, within ten days after the rendition of their decision. Said appraisers were to be chosen and make their appraisal on or before the 10th day of August, 1872. Appraisers were chosen, who fixed the price to be paid by Cox at \$295.24, to recover which sum plaintiff brought the present action.

The defendant, in his answer, resisted a recovery on the following grounds: 1st, that the decision of the referees was not made until after the 10th day of August, 1872, on which day their authority to act in the premises ceased; 2d, that the third referee was not selected with the consent of the defendant, nor after the two first selected had failed to agree, but before any disagreement on their part, and before any effort was made by them to agree; 3d, that the referees were not indifferent and disinterested, as it was stipulated they should be, but partial to the plaintiff and prejudiced against the defendant; 4th, that they refused to hear testimony offered by the defendant.

It appears from the record that the parties selected two appraisers, who met on the 10th day of August; that they differed as to the duties devolved upon them by the agreement of the par-

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ties ; that they thereupon selected a third person to act with them, and adjourned until the 13th day of August, when they met and fixed the value of the lease and crop at the sum sued for by the plaintiff. There was testimony to show, too, that this action of the appraisers was known to and approved by both plaintiff and defendant.

When the appraisers met on the 13th of August, the defendant offered certain testimony, the nature of which the record does not disclose, which they refused to hear, whereupon he repudiated their action and declared that he would not acquiesce in their award. On the day on which the award was made the plaintiff surrendered possession of the entire farm to the defendant, which the latter testified he refused to receive in fulfilment of the agreement, but having an interest in the crop by the terms of the lease, he accepted the possession and notified the plaintiff that he would save the crop at his expense.

Testimony was introduced at the trial in the circuit court, as to all the details of the appraisement and the value of the various articles which were appraised. All the appraisers concurred in fixing the valuation at the amount sued for.

There was a verdict and judgment for \$293.55 and interest, from which the defendant has appealed.

Much of the argument of the appellant's counsel in the court was based upon the idea that the contract declared upon by the plaintiff was a submission in writing to arbitration, within the meaning of our statute on that subject. This view of the nature of that instrument is an erroneous one. It was nothing more than a contract of sale which provided that the price of things sold should be fixed by third persons. There was no previously existing controversy which this instrument submitted to arbitration. The only controversy between the parties was one which the instrument itself created, and while the appraisement which was made with a view of fixing the price of the things sold may have some of the properties of an award, and be subject to some of the rules regulating common law awards, still the appraisement itself could not be made the foundation of an action. The action was properly brought on the contract of sale for the price alleged

to have been fixed by the appraisers. (*Garred vs. Doniphan*, 10 Mo. 161.)

The four grounds of defense relied upon will be noticed in the order in which they have been stated.

Ordinarily, when an appraisement like that under consideration is required to be made within a certain time, it should, like an award, be made within the time limited. But it will depend upon the particular circumstances of the case whether it will be deemed to be of the essence of the contract. It may undoubtedly be made so. It is unnecessary, however, to discuss this point, as it sufficiently appears in the present case that the defendant assented to the adjournment from the 10th to the 13th of August, and on the last named day appeared before the appraisers and offered certain testimony which was rejected. This action of the defendant precludes him from now objecting to the time at which the appraisement was made.

Whether the precise contingency arose, on the happening of which a third appraiser was, by the terms of the contract, to be selected, we need not inquire. If the rule applicable to awards is to be observed in cases like the present, it is wholly immaterial whether there had been any disagreement or any effort to agree before the third appraiser was selected. It is well settled in cases of submission providing for the selection of an umpire in the event of a disagreement of the arbitrators, that the arbitrators may select an umpire even before they enter upon the consideration of the subjects submitted. (*Roe vs. Doe*, 2 Term. R. 644; *Coppin vs. Hurnard*, 2 Saund. 133; *Cowell vs. Waller*, 2 Barn. 154; *Van Cortlandt vs. Auderhill*, 17 Johns. 405; *Lutz vs. Linthicum*, 8 Pet. 178; *Alexandria Canal Co. vs. Swann*, 5 How. [U. S.] 83; *Bigelow vs. Maynard*, 4 Cush. 317; *Dudley vs. Thomas*, 23 Cal. 365.)

In *Harding vs. Watts* (15 East. 556) Lord Ellenborough said: "It is very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel." The second defense must therefore fail as a matter of law.

The third defense proceeds upon grounds which have been firmly established in courts of equity as sufficient to authorize the vacation of an award, and must be regarded as an equitable defense to the present action. After a minute examination, however, of all the testimony in the cause, we are of the opinion that the charge of partiality on the part of the appraisers in fixing the amount to be paid by the defendant, is wholly groundless. And we are confirmed in this opinion by the verdict of the jury, which, under instructions of the court to be hereafter adverted to, was not for the amount fixed by the appraisers, but was based upon the testimony of the witnesses as to the value of Leonard's interest under the lease, and was for a sum differing by less than two dollars from the sum fixed by the appraisers.

The last ground of defense is true in point of fact; the appraisers did refuse to hear testimony offered by the defendant, but it does not appear what the rejected testimony was, and we are not at liberty to infer that it was either pertinent or material, or that the defendant was prejudiced by its rejection.

While the plaintiff declared specially for the amount fixed by the appraisers under the contract, the case seems to have been tried without objection from either party, as though the petition also contained all the common counts. The testimony was full as to the value of the plaintiff's lease and crop, as well as in reference to the action of the appraisers and the mode of computation adopted by them.

The instructions asked by the defendant and refused by the court are not preserved in the record. At the instance of the plaintiff the court properly construed the contract between the parties, and instructed the jury to the effect that if they believed from the testimony that the appraisers chosen acted fairly and impartially in fixing the amount to be paid by the defendant, and that the sum so fixed was the reasonably fair value of the lease and crop, they should find for the plaintiff and assess his damages at the sum awarded, and might, in addition, allow interest at six per cent. from the date of the institution of the suit, to the giving of which the defendant excepted.

The court of its own motion instructed the jury, in substance, that they were not bound by the award of the appraisers if they believed it to be excessive or unfair, and in that event they might find for the plaintiff such sum as they believed from the evidence was a fair valuation of the lease and crop, deducting therefrom such damages as they might find the defendant had sustained on account of any failure of the plaintiff to cultivate the premises in a husbandmanlike manner, and deducting also any indebtedness of the plaintiff to the defendant arising out of the lease. To this instruction no objection was taken.

The defendant admitted in his answer that he ought to pay to plaintiff whatever amount should be found to be justly due on a final adjustment of the matters between them, and the case seems to have been tried with a view of ascertaining that amount, regardless of the pleadings.

The plaintiff is entitled either to the amount fixed by the appraisers or to the value of his property which passed into the hands of the defendant; and while he is not in strictness entitled to recover the latter in a suit for the former, yet as the value has been fairly ascertained by the jury, and as the amount thus found to be due from the defendant differs, as before stated, by less than two dollars from the amount fixed by the appraisers and sued for in this action, we think it would be unjust to the parties to protract the litigation—conceding that the defendant is in a position to take advantage of any conflict in the instructions.

Substantial justice has been attained, and the judgment will therefore be affirmed. The other judges concur.

A. H. PARKER, Appellant, vs. CHAS. MARQUIS, Respondent.

1. *Contract--Fraud--Election of party to rescind or stand by and sue for damages.*—A party defrauded in a contract may stand by it, even after he discovers the fraud, and recover damages resulting from the fraud, or he may rescind the contract and recover back what he has paid or sold.
2. *Contract, executory--Performance of after discovery of fraud--Recovery of damages.*—Where a party has been defrauded by another in making an executory contract, a performance of it on his part, with a knowledge acquired subsequently to the making, and previous to the performance, will not bar him of any remedy for the recovery of damage.
3. *Contract--Fraudulent concealment--Measure of damages.*—Where as compensation for feeding and caring for certain sheep for a year, the keeper was to receive part of the wool and increase, and the fact was fraudulently concealed from him that a portion of the sheep were diseased, he was held entitled as damages to the cost in time and expense of caring for them, including that superinduced by the disease, less his profits under the contract.
4. *Damages--Fraudulent misrepresentations--Must have effect of deceiving, when.*—To authorize damages growing out of fraudulent misrepresentations, it must appear, not only that they were designed to deceive, but, that they did in fact have that effect, and induced the party to act.
5. *Practice, civil--Instructions--Evidence.*—An instruction not founded on the pleadings and the evidence, is improper.

*Appeal from Jasper County Common Pleas Court.**Lay & Belch, for Appellant.*

I. The first count setting up a counter-claim in the answer is fatally defective in not averring an offer to return the property on discovery of the fraud. (1 Chit. Cont. [5 ed.], p. 658 ; Stearns vs. McCulloch, 18 Mo. 411 ; Johnson vs. Meyer's Ex'r, 34 Mo. 255.) It is also defective in that it does not allege that the disease was not perceptible on the sheep. (Stewart vs. Dugan, 4 Mo. 245 ; Benj. Sales, 457.)

II. The second counter-claim is defective in that it does not state that the defendant relied on the representations made by the plaintiff.

III. The instructions asked by the plaintiff should have been given. The contract sued on, and the pleadings themselves, show the existence of the facts on which they are predicated. Their refusal simply allows the defendant to reap all the benefits and to bear none of the burdens of the contract.

IV. The third instruction given for defendant is erroneous. By the terms of the contract sued on defendant was bound to care for and feed the sheep. If he could recover at all, it would only be for such care and attention as were made necessary by the disease, over and above the ordinary care and attention.

V. The fourth instruction given for defendant is erroneous. To make a representation ground for action of deceit or fraud, it must have been known to be false, and have been made with intent to deceive and defraud. (*Joliffe vs. Collins*, 21 Mo. 338; *Peers vs. Davis' Adm'rs*, 29 Mo. 184.)

E. J. Montague, for Respondent.

I. The matter set up as counter-claim was proper. (2 Wagn. Stat. p. 1016, § 13; *Empire Trans. Co. vs. Boggiano*, 52 Mo. 294.)

II. Fraud in the transaction, which is the subject of the suit, may be the subject of counter-claim. (Wat. Set-off, Rec. Count. 623, § 612, 2d ed.)

III. It was not necessary that defendant return the sheep, upon discovery of the fraud, to enable him to interpose his defense when sued on the contract. (Wat. Set-off, etc., §§ 493, 495; Sedg. Dam. top p. 312, side p. 296, 3d ed.; *Whitney vs. Allaire*, 4 Denio, 554.)

IV. The measure of damages as declared by the court below was proper. Damages are the natural and proximate results of the injuries complained of. (Sedg. Dam., 3d ed., top 64, 65, side p. 66, 67.) Time employed and expense incurred in feeding and doctoring the sheep were the natural results of the fraud practiced upon the defendant, and were proper subjects for consideration by the jury in estimating defendant's damage. (Sedg. Dam., 3d ed., pp. 74, 75, 76, 77.)

NORTON, Judge, delivered the opinion of the court.

Plaintiff's action is founded on a written contract in which plaintiff agreed "to furnish defendant with 1134 sheep for one year in good fix," and to bear half the loss of said sheep from

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death ; the defendant on his part agreeing to take, feed, and care for said sheep for one year, and bear half the loss of the sheep, and to have for his pay one-half the wool and one-half the lambs.

In his petition plaintiff alleged that defendant at the end of the year did not return to him 1134 sheep received by him under the contract, but only returned seven hundred ; that defendant did not return to him one-half the lambs, and that he failed to deliver to plaintiff one-half the wool produced from said sheep, by reason whereof he claims the sum of \$2,200.

The answer of defendant admits the contract and the receipt of 1134 sheep under it, and after denying all the allegations of the petition, relating to breaches of the contract, sets up in his answer, by way of counter-claim, that the sheep, at the time they were delivered to him, were not in good fix, but were afflicted with a disease known as "*scab* ;" that plaintiff knew they were thus diseased, and concealed the fact from defendant ; that 206 of them died from the effects of the disease, and that defendant was subjected to great expense in feeding and doctoring said sheep, and that by reason of the fraud of plaintiff he was damaged in the sum of \$500.

For a further counter-claim the answer charged that at and before the time of entering into said contract, plaintiff, for the purpose of inducing defendant to enter into it, represented and assured him that the ewes among said sheep would not have lambs until March 1869 ; that such representations were false and fraudulent, and made for the purpose of cheating and defrauding defendant ; that all of the lambs that were born of said ewes came in December and February preceding March, 1869, and died in consequence thereof, by which he sustained damages in the sum of \$500.

Plaintiff, by replication, denied the allegations of the answer, and on a trial, verdict and judgment for \$500 were rendered for defendant, from which plaintiff has appealed to this court.

On the trial of the cause defendant offered evidence tending to show that he had been damaged in expenses of time and money in feeding and doctoring said sheep, and also time in caring for them, and expense of feed. Plaintiff objected to the evidence on

the ground that the measure of damages sought to be established by it, was not a proper one, it not having been shown that defendant offered to return the sheep on the discovery of the fraud.

The action of the court, in overruling the objection, is assigned here for error.

A party defrauded in a contract has his election of remedies. He may stand to the bargain even after he has discovered the fraud, and recover damages on account of it, or he may rescind the contract and recover back what he paid or sold. Where a party has been defrauded by another in making an executory contract, a subsequent performance of it on his part, even with the knowledge acquired subsequently to the making, and previous to the performance, will not bar him of any remedy for the recovery of damages. (Long Sales, 214-16; 2 Kent Com. 480; Whitney vs. Allen, 4 Denio, 554; Page vs. Whalen, 7 East, 274.) Applying the above principles to a determination of the question raised, and the action of the court in allowing the evidence to go to the jury, was entirely proper. The compensation defendant was to receive under the contract, was half the wool and half the increase of the sheep; the price, or consideration, he was to pay therefor, was the caring for and feeding the sheep for one year. If, in consequence of the fraudulent concealment by plaintiff of the disease with which the sheep were afflicted, defendant was deprived of what he would otherwise have received under the contract, then he was entitled to recover damages therefor, and, we think, in this case a fair measure of damages would be the time expended in caring for and feeding the sheep, and the cost of the same, less the profits received by him under the contract. If the care and custody of the sheep was rendered more onerous in consequence of the fraud practiced by plaintiff, we can see no reason why this should not be taken into account in estimating damages, inasmuch as the contract imposed upon defendant, in terms, the care of them as the price to be paid by him for the consideration he was to receive.

The objections to the third instruction given for defendant are not well founded. The instruction embodies the principle above expressed, and was therefore properly given.

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The fourth instruction given for defendant substantially declares, that if, at the time defendant entered into the contract, plaintiff represented that the ewes would not have lambs before the middle of March, and defendant relied upon such representation, and was thereby induced to enter into said contract, and said ewes had their lambs in the winter, by reason of which they died, then defendant was entitled to recover the value of the time and labor in feeding and caring for them, and the value of the lambs and wool lost thereby, less the amount of profit received by him from said ewes and lambs.

The answer of defendant, setting up counter-claim, to which this instruction was intended to apply, charges that at the time of making the contract plaintiff represented that the ewes in said flock of sheep would not have lambs till March; that the representations were false and fraudulent, and made for the purpose of cheating and defrauding defendant. It is not charged that the defendant relied on the representations, nor that he was induced by them to enter into the contract; nor that he was deceived thereby; nor that plaintiff knew that they were false.

The instruction makes a case for defendant, not made in his answer, nor is the case made in the evidence so far as the bill of exceptions show, and for that, if for no other reason, should have been refused. It might be true that the representations were made as charged, and yet, unless they were relied on by defendant, and he was induced thereby to enter into the contract, he cannot complain. (*Jolliffe vs. Collins*, 21 Mo. 338; *Peers vs. Davis*, Adm'r, 29 Mo. 184.)

Judgment reversed and cause remanded. The other judges concur.

 Davis v. Luster.

LUTHER M. DAVIS, Respondent *vs.* RHODA M. LUSTER, Appellant.

1. *Equity—Action to set aside conveyance for duress—Allegations, sufficiency of.*—In suit in equity to set aside a deed of plaintiff for alleged threats made to him to prosecute his brother for adultery, unless the conveyance were made, where it is not alleged that his brother was innocent of the crime, or that such prosecution would be unlawful, no foundation is laid for the relief sought. Nor will it be afforded, although it is alleged that such declarations are coupled with threats to stir up a mob and hang his brother, where plaintiff does not lay the foundation for separate relief by alleging plaintiff's belief that his failure to execute the deed would result in the carrying out of the latter threats.
2. *Contracts—Moral duress—Relief in equity.*—Where contracts are made in consequence of fraudulent advantage taken of the affections or sensibilities of a party, or under the influence of threats or apprehensions—although not amounting to legal duress, equity will grant relief.

Appeal from Jasper Court of Common Pleas.

W. H. Phelps, for Appellant, cited: Pars. Cont., 392.

Lay & Belch, for Respondent, cited: 1 Bouv. Law Dic. 454; 7 Wall. 214; Chit. Cont. 217; Greenl. Ev. 283; 16 Ves. 156; 1 Ves. Jr. 22; 9 Penn. 14; 27 Penn. 22; 11 Mass. 318; 13 Mass. 371; Forshay vs. Furguson, 5 Hill. 158; Central Bank vs. Copeland, 18 Md. 317; Edie vs. Shannon, 26 N. Y. 12; 1 Sto. Eq. Juris. [9th ed.] 239; Harmony vs. Bingham, 12 N. Y. 99, 229; Fleetwood vs. City of N. Y., 2 Sandf. 475; Tutt vs. Id., 3 Blatch. 250; Aster vs. Reynolds, 2 Strange, 9, 915; Brown vs. Peck, 2 Wis. 277; Oates vs. Hudson, 5 Eng. Law & Eq. 469; 2 Inst. 482; 2 Roll. Abr. 124; Richardson vs. Duncan, 3 N. H. 508; Watkins vs. Bird, 6 Mass. 511; Huguenin vs. Baseley, 3 Lead. Cas. Eq. 94; Tapley vs. Tapley, 10 Minn. 448; 1 Pars. Cont. 319, 392; 33 Mo. 412; 59 Mo. 124; 10 Allen, 76; Wagn. Stat. 1036.

HOUGH, Judge, delivered the opinion of the court.

This was a suit to set aside a conveyance made by the plaintiff to the defendant, of a lot in the town of Joplin.

The circumstances attending and superinducing the execution of the conveyance, and which are relied on to obtain the relief sought, are thus stated in the petition: "that on said 29th day

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of August, 1873, defendant, intending to cheat and defraud plaintiff, procured plaintiff to make and plaintiff did make a deed of conveyance of said real estate to defendant; that defendant and other persons acting with her and aiding and assisting her, threatened to charge plaintiff's brother, G. H. Davis, with having committed adultery with defendant, and said other persons would prosecute plaintiff's brother for said alleged offense and that they would stir up a mob and hang plaintiff's brother if plaintiff did not deed said real estate to defendant; that plaintiff, fearing that defendant and said other persons aiding her, would carry their threats into execution, and bring plaintiff and his said brother into disgrace, or that they would carry their threats of violence into execution, and do this plaintiff and his said brother the injury threatened, was compelled against his will, by said threats, to execute and deliver to defendant said deed of conveyance; that said deed of conveyance was executed by plaintiff without any consideration whatever but through the fear aforesaid."

The defendant failed to plead in time, and the court entered judgment for the plaintiff, for want of an answer, which judgment it refused to set aside. The only question to be determined, as the case is now presented, is, whether the foregoing extract from the petition stated sufficient grounds for avoiding the deed.

That a contract or conveyance made under compulsion, amounting to duress, may be set aside in equity, is not controverted by the defendant. But it is insisted on her behalf, that the threats recited in the petition were not sufficient to constitute legal duress, and therefore the relief sought for should be denied.

Duress is divided at common law into two classes, duress *per minas* and duress of imprisonment. Duress *per minas* is confined to fear of loss of life or of limb, fear of mayhem and fear of unlawful imprisonment. Duress of imprisonment is well defined in *Richardson vs. Duncan* (3 N. H. 508), as an arrest for improper purposes without a just cause, or an arrest for a just cause but without lawful authority, or an arrest for a just cause and under lawful authority for unlawful purposes. This latter

class need not be referred to again, as it has no relation whatever to the case at bar.

While the rigidity of the common law rule as to duress *per minas* has been somewhat relaxed in this country, and the common law definition has been extended by some decisions so as to include fear of a mere battery, or of the destruction of goods, we know of no case in which it has been held to include a threat of lawful prosecution.

Another rule on this subject, announced by some authors and in some adjudged cases, is, that the duress which will avoid a contract must be offered to the party who seeks to take advantage of it. But as early as the year 1609, it was said in the case of Baylie vs. Sir Henry Clair "that the husband may avoid his deed that he hath sealed by the duress of imprisonment of his wife or son."

In *M'Clintock vs. Cummins* (3 McLean) it was said: "The father and son may each avoid his obligation by duress of the other, and so a husband may avoid his deed by duress of his wife."

In the present case the threats were not made *against* the plaintiff, but only *to* the plaintiff and against his brother, and in this respect it differs from all the cases we have examined involving the question of legal duress. But it has long been the habit of courts of equity to relieve parties from contracts made under the influence of threats, or of apprehensions not amounting to legal duress. Where a fraudulent advantage has been taken of the fears, the affections or the sensibilities of a party, equity will grant relief. Judge Story says that circumstances of extreme necessity and distress of a party, though not accompanied by any direct restraint or duress, may so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attendant upon it. In such case he has no free will, but stands *in vinculis*. (2 Sto. Eq. § 239.)

When there is such compulsion or moral duress there is, in the eye of the law, no consent, for the consent that binds must be voluntary. And we can see no good reason why, when such a

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state of mind ensues upon the prosecution or oppression of a brother, and a conveyance or other written obligation or contract is thereby extorted, relief should not as readily be granted as it would be when the conveyance or contract sought to be avoided had been extorted from either father or son by the duress of the other. But circumstances of oppression or imposition should clearly appear, and not simply a case where a party may have purchased immunity for his brother from lawful prosecution.

We do not feel entirely willing to declare that the plaintiff's situation, as shown by the facts stated, was fully within the rule above laid down. It is nowhere alleged in the petition that the plaintiff's brother was threatened with an unlawful prosecution or unlawful arrest; it is not averred that he was innocent of the crime of adultery. If he had committed that offense, and the plaintiff, to shield him from the threatened punishment, had made the conveyance in question, we do not think he would be entitled to be heard in a court of equity for the avoidance of his deed. The contract being executed by which he had enabled the defendant to compound a misdemeanor, the maxim, *in pari delicto potior est conditio defendentis, et possidentis*, would apply. (Kitchen vs. Greenabaum, 61 Mo. 110.) It is true that it is also charged that his brother's life was threatened, but this mere act, as stated, was not of a present and pressing nature, and the threat of prosecution is so mingled with it in the statement, as the moving cause of the conveyance, that we cannot consider it as a distinct and independent ground of relief. It does not definitely appear that the plaintiff absolutely believed that the threat to raise a mob would be carried into execution if he did not make the conveyance. He states in his petition that he feared they would carry their threats to prosecute into execution, or that they would carry their threats of violence into execution. As the threat to prosecute is insufficient, as stated, to entitle the plaintiff to relief, it should clearly appear that the conveyance was executed through fear of violence to his brother from the mob. This is not positively stated, but on the contrary, it is stated in effect that the plaintiff believed that if they did not stir up the mob they would prosecute his brother. This was not sufficient.

Gray v. The Missouri River Packet Co.

We will reverse the judgment with directions to the court below to allow the plaintiff to amend his petition, and thus save to him whatever rights he may have. Judgment will be entered accordingly. The other judges concur.

YOUNG E. GRAY, Respondent, *vs.* THE MISSOURI RIVER PACKET Co., Appellant.

1. *Practice, civil—Instructions—Evidence—An instruction not based on evidence is properly refused—Carriers—Mandatory—Declarations—What constitute—Measure of damages—Negligence—Interest.*
- 1st. A carrier who transports property gratuitously is liable for injuries thereto only in cases of gross negligence, but a declaration by him that he will "charge little if anything" does not constitute him a mandatory so as to bring him within that rule, even though his statement be coupled with an unexpressed intention to transport without hire.
- 2d. In the absence of an agreement a promise to pay a reasonable sum for freightage arises by implication.
- 3d. In case of loss or destruction the carrier is bound for the value of the property at the time of contemplated delivery, less freightage, if unpaid. But in the absence of proof as to amount of freightage, no deduction should be made therefor.
- 4th. Interest may be charged in case of gross negligence. In the absence of negligence, interest may be withheld.

Appeal from Lafayette Circuit Court.

Ryland & Ryland, for Appellant, cited: *Chouteau vs. Steamboat St. Anthony*, 20 Mo. 519; *Id.* 16 Mo. 216; *Sto. Bailm.* 6th Ed., p. 468, note; *Fay vs. Steamer New World*, 1 Cal. 348; *Nelson vs. McIntosh*, 1 Stark. 188; *Beardslee vs. Richardson*, 11 Wend. 25; *Pars. Cont.* 586 and notes; *Smithers vs. Steamboat War Eagle*, 29 Mo. 312; *Ready vs. Steamboat Highland Mary*, 17 Mo. 461; *Sto. Bailm.* 6th Ed. §§ 173-176, 182; *Ketchum vs. American Merchants Union Express Co.*, 52 Mo. 390; *Read vs. St. L., K. C. & N. R. R. Co.*, 60 Mo. 166; *Trans. Co. vs. Traube*, 59 Mo. 355; *Sedgw. Dam.* ch. 13; *Atkinson vs. Steamboat Castle Garden*, 28 Mo. 124; *Henschen vs. O'Bannon*, 56 Mo. 289, and cases cited.

Wallace & Chiles, for Respondent, cited: Sedgw. Dam. 6th Ed., marg. pp. 355, 357; 13 Minn. 92; Woodward vs. Illinois Cent. R. R. Co., 1 Bissell, 403; Smith vs. Whitman, 13 Mo. 352, 359; Atkinson vs. Steamboat Castle Garden, 28 Mo. 124, 127; 35 Mo. 380; Wagn. Stat., 1068, § 32; 48 Mo. 23; Levering vs. Union Mo. Trans. & Ins. Co., 42 Mo. 88; R. R. Co. vs. Lockwood, 17 Wall., (U. S.) 382-3; Johnson vs. Morrow, 60 Mo. 342.

NORTON, Judge, delivered the opinion of the court.

This was an action in which defendant is sought to be charged as a common carrier for transporting a jack, the property of plaintiff, in so careless a manner as to occasion his death. The defendant by way of defense denied negligence as charged, and set up in his answer as a further defense that the shipment of the jack was to be made gratuitously and without compensation, and not for hire.

On the trial plaintiff obtained judgment for \$660.30 from which defendant has appealed and assigns for error the rejection of evidence and the giving and refusing instructions. Plaintiff, who was introduced as a witness, was asked to state "what he had paid for the jack in 1873, and whether he had not agreed to pay his lawyer one-half the recovery which might be had, and how much more the jack was worth in 1874 than when he bought him."

The question for determination being the value of the animal at the time he was injured, the evidence offered was properly rejected by the court because it had no tendency to elucidate the question. If the witness had been asked how much the jack was worth, and not how much he paid for him in 1873, and how much less or how much more he was worth than at the time he received the injury, it would only, then, have been equivalent to asking him the question how much he was worth at the time he was injured, and would have been an indirect instead of a direct method in solving the question as to the value of the animal.

On the same principle the objection to the statement made by witness Shelby "that he was not acquainted with the value of such animals since the war, but before the war they were worth \$800 or \$1,000" should have been sustained by the court.

This error, however, is cured by the subsequent action of the court in giving an instruction confining the jury in their estimate to the value of the jack at the time of the injury. Besides this the record shows that a number of witnesses testified that the animal was worth \$1,000 at the time he was shipped, and we cannot see how the defendant was prejudiced by the statement.

The following instruction asked by defendant was refused by the court: "If the jury believe from the evidence that the jack in controversy was to be transported from Berlin on the south side of the Missouri river to Grider's landing on the north side of said river by said defendants, without hire or reward from plaintiff and solely and gratuitously to accommodate plaintiff, then the defendant is not liable in this action unless the jury should further find that the defendant was guilty of gross negligence which the court defines to be that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns." The instruction asserted a correct principle of law as applicable to mere mandatories. It was nevertheless rightfully refused by the court, because under the view we take of the case, as disclosed in the record, there was no evidence on which to base it. It appears from the evidence that plaintiff applied to one Rider, captain of the Steamboat "Alice" which was being used by defendants in their business as carriers, to ship his horse and jack, and that he agreed to transport them for him. He asked Rider what would be the charge, who said in reply that he never took anything for less than a dollar, and directed plaintiff to bring on his stock. Rider testifies as follows: "I promised Gray to take his stock, he came and asked me what I would charge. I said 'not much, if anything.' I did not intend to charge him anything. I took him over purely to accommodate Gray."

The secret intention of Rider, unexpressed and locked up in his breast not to charge Gray anything for the transportation of his stock, does not tend to establish an agreement for its gratuitous transportation, especially when connected with what he did express that he would "charge him not much if anything." We appre-

hend that if Gray had been sued for the transportation of his stock it would have been no reply to the action for him to have set up as a defense that Rider said when he was applied to for the price that he would not charge him much, if anything.

After an injury results to property intrusted to a common carrier for transportation, who upon receiving it for that purpose declined to fix the price or charge for the transportation, he cannot be allowed to come in and defeat a recovery by saying that at the time of its reception he had a secret intention, unexpressed to the shipper or consignor, and not agreed to by him, not to charge anything, and that the transportation was gratuitous and not for hire. The instruction copied as well as the first instruction asked by defendant upon a kindred subject were therefore properly refused. The seventh instruction given on behalf of plaintiff in so far as it contained the word "gratuitously" was erroneous, but as under the views above expressed no injury could result therefrom to defendant it is no cause for disturbing the judgment.

It is also objected that the court misdirected the jury by its third instruction, in which they were told that if they found for plaintiff they would assess his damages at the actual value of the jack at the time he was shipped with the six per cent. interest from that time. It is a general rule that when goods are delivered by a common carrier according to contract, the measure of damages is the value of the goods with interest from the day they should have been delivered, less the freight if unpaid. (Sedg. on Dam. 424; King vs. Shepherd, 3 Sto. 349; Cushing vs. Wells, Fargo & Co., 98 Mass. 550; Woodward vs. Illinois Central R. R. Co., 1 Bissel, 503; Corby vs. Davidson, 13 Minn. 92; Mote vs. Chicago & N. W. R. R. Co., 27 Iowa, 22.)

In the case of Atkinson vs. Steamboat Castle Garden (28 Mo. 124.) Judge Scott remarks "that the allowance of interest in these cases depends on circumstances and will be given or withheld in all other cases of unliquidated damages." When a loss occurs without negligence in cases of this class, interest might be withheld. In the case at bar the negligence as shown by the proof was of the grossest character, and the manner in which the jack

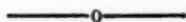
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was thrown down and dragged on to the boat might well have subjected the parties engaged in it to a prosecution under the statute for cruelty to animals. In consequence of it plaintiff had an animal with broken limbs thrown on his hands to be cared for, till he died from the injuries, one week after they were inflicted. We think the circumstances justified the allowance of interest.

While the instruction as to the measure of damages is silent in regard to the duty of the jury to deduct from the value of the animals and interest the freight, the silence of the court may be justified by the silence of the witnesses in regard to what it was worth.

The defendant agreed to ship the stock without the price being fixed or agreed upon, and the promise to pay what was reasonably worth arose by implication of law, and in the absence of proof, showing what it was worth, the court committed no error in not alluding to it.

Judgment affirmed, the other judges concurring.



WM. HUFF, Appellant, vs. M. S. ALSUP, et al., Respondents.

1. *Justices of the peace—Execution—Private person not empowered to levy.*—Since the revision of 1865 (see Gen. Stat. 1865, ch. 178, p. 702, § 20), a justice of the peace cannot empower a private person to execute a final process. The "chapter" (ch. 178) referred to by § 20, treats only of ordinary process. The division into chapters in the last edition (Wagn. Stat. ch. 82) has not the force of legislative enactment.

Appeal from Howell Circuit Court.

Monks & McCown, for Appellant.

A constable empowered or deputized by a justice of the peace has only power to serve and return any process issued under article 1, Wagn. Stat. 812. (See p. 815, § 20.)

A. H. Livingston, with *B. P. Smith*, for Respondents.

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A special constable has the legal power to execute an execution as well as any other process issued from a justice's court. (Wagn. Stat. 815, § 20 ; Jones vs. Hopper, 9 Mo. 173.)

SHERWOOD, Judge, delivered the opinion of the court.

Action for damages for wrongfully taking certain personal property. The defendants justified the taking under a writ of execution, and the only point requiring decision is, whether the writ, under the circumstances of the case at bar, constituted a valid defense to plaintiff's action.

The law as it stood in 1835 (Stat. 1835, p. 352, § 20) undoubtedly gave sanction to the issuance of a writ of execution to a private person, on the occurrence of certain contingencies, as section 20 of the act approved March 21, 1835, provides that: "Every justice issuing any process authorized by this act, upon being satisfied that such process will not be executed for want of an officer to be had in time to execute the same, may empower any suitable person, not being a party to the suit, to execute the same by an indorsement upon such process to the following effect: 'At the request and risk of the plaintiff, I authorize ——— to execute and return this writ.

(E. F., Justice of the Peace)';

and the person so empowered shall thereupon possess all the authority of a constable in relation to the execution of such process," etc., etc.

This section remained unchanged by the revision of 1855 (R. C., vol. 2, p. 933, § 20); but in 1865 the word "act" was omitted and that of "chapter" substituted therefor. (Gen. Stat. 1865, p. 702, § 20.) The chapter thus referred to is chapter 178, which does not treat of nor embrace any other save ordinary process (Hench vs. Chaney, 61 Mo. 129), the subject of final process being treated of in chapter 184 of the General Statutes. And this change has been entirely overlooked in the statutes now in use as chapters from 177 to 185, inclusive of the General Statutes, have all been incorporated into chapter 82 of Wagner's Statutes. So that the mistake might, without examination, be readily made, that a justice was still possessed, as formerly, of

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power to authorize a private person to execute final process as well as that of an ordinary character ; which latter, as above seen, is the only process now authorized by section 20 *supra*.

This leads to the reversal of the judgment and the remanding of the cause. The other judges concur.

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STATE *ex rel.* SCHOOL DISTRICT No. 2, T. 39, R. 28, ST. CLAIR Co., Appellant, *vs.* BOARD OF EDUCATION OF APPLETON CITY, Respondent.

1. *Schools—Sub-district—Organization of towns with adjacent territory—Votes—Particulars as to, what unessential to validity of organization—Directors—Ouster of, grounds for.*—Territory embraced in a school sub-district outside of and adjoining an incorporated town may, under art. 2, § 1, *et seq.* of the school law (Wagn. Stat. 1262), be organized at the same time with that part within the corporate limits.

And it is not necessary, to render such organization lawful, that the voters of the sub-district residing within and without the corporate limits shall be in a certain ratio to each other, or that all or any given number of those qualified shall vote at the election, or that the votes shall all be lawful, provided that a majority of the lawful ones are for the organization. And *a fortiori* no such grounds will lie for ouster of directors elected under such organization, where there is a general acquiescence in the organization and election till the issue of bonds by the sub-district, and the erection of a school house from the proceeds.

And to authorize ouster of the directors for failing to receive a majority of the qualified votes, that fact must appear affirmatively.

Appeal from St. Clair Circuit Court.

E. J. Smith, with W. P. Johnson, for Appellant, cited : State *ex rel.* Case *vs.* Searl, 50 Mo. 268 ; Sess. Acts 1867, p. 165 ; Adj. Sess. Acts 1868, pp. 163, 164 ; Adj. Sess. Acts 1870, pp. 127-134 ; Adj. Sess. Acts 1874, pp. 192, 193 ; Gen. Stat. 1865, ch. 47.

Clark & Ferguson, for Respondent.

NORTON, Judge, delivered the opinion of the court.

This is a proceeding by *quo warranto* at the relation of school district No. 2, of township 39, range 28, in St. Clair county,

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against the board of education of Appleton City, charging them with usurping control over the territory and local affairs of said district No. 2.

The cause was tried upon an agreed statement of facts, from which it appears, that previous to the year 1870 said school district No. 2 was organized, and included all of sections 5, 6, 7 and 8 in said township; that in 1870 the town of Appleton City was laid out on a part of said section 5, and was duly incorporated by the county court of said county in February, 1871; that on the 10th of April, 1871, twelve resident freeholders of said district No. 2, eleven of whom resided in the said town and one outside of its limits, but within the limits of the district, caused a notice to be put up in three places in said town, notifying the electors of said district No. 2, including the town of said Appleton City, that on the 20th of April, 1871, a meeting would be held at the office of Reed & Emmons in said district, then and there to vote by ballot for or against the adoption of an act for the organization, in towns, of schools with special privileges. In pursuance of said notice a meeting was held at the place and time designated, at which seven residents of said district were present, two of them being outside and the others inside the town, who proceeded to vote for "school law," or "no school law." All voted except one who lived inside the town and one who lived outside the town, and the result was declared to be in favor of the school law as provided in the Act of March 1870, "to authorize cities, towns and villages to organize for school purposes with special privileges." On the same day these notices were posted up, two inside and one outside of said town, stating that an election would be held on the 6th day of May, 1871, at the office of Reed & Emmons, for the election of six members to constitute the board of education for the town of Appleton City. At the time and place designated an election was held, at which six directors were elected, three of them being inside the limits of the town, and three of them being outside.

It is admitted that sixty-six persons voted at the said election, of whom forty-three lived in the town and twenty-three out of it, and of the whole number fifteen were registered and fifty-one not

registered. It appears that the registering officer of the township came there on that day, and without notice having been given, swore those not formerly registered, and had them to sign the registration, but did not make any return or preserve the list.

The board thus elected organized on the 15th of May, and on the 29th of the same month issued \$12,000 of bonds for the erection of a school house, and on the 31st of August issued \$3,000 more of bonds for the same purpose, all of which went on the market and were sold. It was admitted that, ever since, said board of education has exercised and claimed authority over all the territory embraced in said district No. 2; that with the proceeds of said bonds they did erect a school house; that the people outside of said town acquiesced in said organization till September, 1871, when they were advised they were not bound by it; that a school was taught in said house, and from November, 1871, to May, 1872, the children throughout the district attended the same, and that there was no other school taught in the district; that in April, 1872, the people in said district No. 2, outside of said town, elected three directors for said district, and have continued annually to elect them since that time, and have continued to conduct a school independent of the school conducted by the board of education of Appleton City. It was also admitted that the records of the county court still recognize said sub-district No. 2 as an existing district.

On a trial of the cause the information was dismissed, defendants discharged and judgment for costs rendered against the relators, from which they have appealed.

The main question presented for our determination is whether, under the facts, sub-district No. 2 was merged in the school district of Appleton City.

The 1st section of the acts of 1867 provides that "any city, town or village, the plat of which has been previously filed and recorded in the recorder's office of the county wherein the same is situated, together with the territory attached, or which shall hereafter be attached to any such city, town or village, may be organized and established into a single school district, in the manner and with the powers hereinafter specified."

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Section two provides that in order to form such organization written notice shall be posted up in three or more public places in said contemplated district, signed by at least twelve resident freeholders of the same, requesting the qualified electors in said district to assemble upon a day, at some suitable place to be named in said notice, then and there to vote by ballot for or against the adoption of this act, which notices shall be posted at least ten days prior to said meeting.

Section three provides that the electors, when assembled, shall appoint a chairman, assistant chairman and clerk, who shall be judges of the election. The electors in favor of the adoption of this act for said district shall write on their ballots "School Law," and those opposed thereto "No School Law," the adoption or rejection of the act to be determined by a majority of the votes to be cast as aforesaid. In case a majority of the votes thus cast shall have been for the law, the electors of said district shall assemble at the same place within twenty days from the adoption of this act, of which ten days' notice shall be given, and shall then choose by ballot six directors of the public school of said district.

The directors, within ten days after their election, shall meet and organize by choosing a president, secretary, treasurer, etc.

It is insisted by counsel that in order to include the territory outside the corporate limits of the town, the town must first be organized as a single school district, and the outside territory then attached under section seventeen of the act.

This question is not one of first impression, for the point involved in it was expressly passed upon by this court, in case of the State *ex rel.* vs. Board of Education of Appleton City, 53 Mo. 127. The same question was again involved in the case of the State *ex rel.* vs. Heiser, 60 Mo. 540. In that case the town of Kingston, which was included in sub-district No. 2 in Caldwell county, organized a single district under the same law under which respondents in the case at bar organized. Judge Vories in disposing of the point says: "In this case all of the territory included in district No. 2, embracing Kingston, was attached together for school purposes; and it was necessary and proper when an attempt should be made to organize the town of

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Kingston under this law, that the whole district of country there-to attached for school purposes should be included. * * * If, after the separate school district is organized under the law, it becomes desirable to have additional territory from other portions of the township annexed for school purposes, it must be annexed under the provisions of the seventeenth section."

It is true, it is said in that case, "that it was right and proper that all of the qualified voters should vote and participate in such organization," which seems to have been done. The inference, however, is not to be drawn from this language, as counsel have attempted to do, that it required all or any given number of the qualified voters to vote on the organization of a single district, especially so when the law authorizing the proceedings declares in express terms that the adoption or rejection of the act shall be determined by a majority of the votes cast without reference to the number which may be cast.

The objections taken to the manner in which the notices were posted, as well as to the fact that only five voted on the question of adopting the law, and that eleven of the twelve who signed the notices lived in the town, and only one outside of it, are too technical to impeach their validity.

It appears that at the election for directors of the board of education for Appleton City, the voters both of the town and sub-district participated, and the result was the election of three directors residing outside and three residing inside the town. It further appears that of those who voted, only fifteen were registered voters and fifty-one not registered, unless the act of the registering officers on the day of the election, in requiring those who had not been registered to take and subscribe an oath, the character of which is not disclosed in the facts agreed upon, is to be considered a registration. But conceding this to be so, the main fact that illegal votes were cast at the election, and mingled with legal votes, does not make the election void nor impeach the title of those elected if they received a majority of the votes of those who were legal voters.

There is nothing in the record nor agreed statement of facts showing that the directors elected did not receive a majority of

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the legal votes cast, a fact which must appear before judgment of ouster could be rendered against them. It further appears that there was a general acquiescence in the election of the directors, and the organization of the single district for Appleton City, until after \$15,000 of bonds had been issued and a school house built out of the proceeds, and not till then was it that the irregularities were discovered which constitute the ground of relator's complaint. We think the judgment of the court below was rendered for the right party under the law and facts of the case.

Judgment affirmed, the other judges concurring.

EX PARTE BABE SNYDER.

1. *Constitution*—Cass County Common Pleas Court "in force" under—*Conviction by Probate and Criminal court of, void—Habeas corpus.*—The act of March 1875, establishing a Probate and Criminal court in lieu of the Common Pleas court of Cass county, by its terms was not to take effect till January 1876. The present Constitution was dated Nov. 1875. Section 3 (p. 43) of that Constitution providing that "all other courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges," embraced in its description that court; and the term of office of its judge holding at the adoption of the Constitution did not expire till 1878. *Held:*
 - 1st. The Common Pleas court at the time of the adoption was "in force," (Const. § 1, p. 43) and the act of March 1875, never became operative, being repugnant to section 3, *supra*, which recognized the continued existence of the Common Pleas court.
 - 2d. Hence, a conviction by the Probate and Criminal court was void and of no effect. The rule that the acts of an officer *de facto* are valid, has no application where the office itself does not exist.
 - 3d. The prisoner was properly released for that cause on habeas corpus.
2. *Habeas corpus—Commitment by court having no jurisdiction.*—Where a prisoner has been committed by a court having absolutely no jurisdiction, the validity of the commitment may be inquired into on *habeas corpus*.

Petition for Habeas Corpus.

Bogges & Sloan, with Hall & Given, for Petitioner,
 cited: *Mason vs. Woerner*, 18 Mo. 566; 1 J. J. Marsh. [Ky.]
 205, 206; *People vs. White*, 24 Wend. 520, 539, 540, 541;

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People *ex rel.* Kearney vs. Carter, 29 Barb. 208; Perkins, Treas., vs. Corbin, 45 Ala. 103; Craig vs. State of Mo., 4 Pet. 431; Buel's Case decided by Judge Treat in Eastern District of Missouri; Garland's case, 4 Wall. 333; Cummin's case, 4 Wall. 277; Murphy and Glover Test Oath cases, 41 Mo. 339; State vs. Steptoe, 61 Mo. 411; Jones, *Ex parte*, 27 Ark. 349; Perry vs. State, 41 Tex. 488; Hurd Hab. Corp. 331; *Ex parte* Strahl, 16 Iowa, 369; The People vs. Bradley, 40 Ill. 390; State *ex rel.* Henderson, vs. County Court of Boone Co., 50 Mo. 317; 27 Me. 114.

J. L. Smith, *Att'y Gen'l*, for Respondent, cited: State vs. Douglass, 50 Mo. 593; People *ex rel.* vs. Burgess, 24 Ill. 184; State vs. Carroll, 6 Am. Law. Rep. 754; Harbaugh vs. Winson, 38 Mo. 327; State *ex rel.* Craig vs. Dougherty, 45 Mo. 294.

SHERWOOD, Judge, delivered the opinion of the court.

In 1867 the legislature created the Common Pleas court of Cass county. Subsequently, by the act of March 1873, probate jurisdiction was conferred on that court, as well as concurrent, original and appellate jurisdiction with the circuit court in all civil cases. By the second section of the amendatory act, an election for judge of that court was to be held in 1874, and it was held accordingly, and the present incumbent elected for the term of four years.

In March, 1875, an act was passed repealing the former acts, and establishing, in lieu of the Common Pleas court, a Probate and Criminal court, to be possessed of exclusive, original and appellate jurisdiction in all criminal cases, and a like jurisdiction in all probate matters, with certain exceptions not necessary to be enumerated.

This act was not to take effect until January 1, 1876, when the governor was to appoint a judge who was to hold office until his successor, to be elected in the fall of that year, was elected and qualified. This appointment and election have taken place, and the prisoner, whose application we are now to consider, was indicted, convicted of grand larceny, and is now in the peniten-

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tiary in execution of the sentence of the Probate and Criminal court.

This application necessarily involves the consideration of three points: First, whether the new Constitution, which dates from November 30th, 1875, prevented the act last mentioned from becoming operative; second, if such prevention did occur, the effect thereof on the case at bar, touching the validity of the conviction; third, whether the present is a proper method of procedure whereby such conviction may be called in question.

I.

Relative to the first point; It will be observed that the new Constitution (§ 3, p. 43) divides all common pleas courts existing and organized into three classes; providing that those in cities and towns having a population exceeding 3,500, and such as are presided over by a judge of the circuit court, shall continue to exist, etc., until otherwise provided by law, and that "all other courts of common pleas shall cease to exist at the expiration of the present terms of office of the several judges thereof."

The Common Pleas court of Cass county falls within the last named class, if the words just quoted are to be received in their ordinary import. Receiving them in this manner we but adopt the advice of Judge Story, who says (Sto. Const. § 451): "Constitutions are not designed for metaphysical or logical subtleties; for niceties of expression; for critical propriety; for elaborate shades of meaning; or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." Receiving these words, then, of the Constitution in the way thus pointed out, there is no room left except for the conclusion that the Common Pleas court of Cass county was given, together with all others of its class, a *constitutional and permissive existence* until the expiration of a certain period.

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And on turning to another section (Const. § 1, p. 43), this view finds additional confirmation; for all laws *in force* at the adoption of the constitution, and not inconsistent therewith, are to remain *in full force* until altered or repealed by the general assembly, while "all laws (though not in force) inconsistent with the constitution shall cease upon its adoption."

It will not be denied that the law establishing the Common Pleas court of Cass county was *in force* when the constitution was adopted, nor that such law was consistent therewith, nor will it be affirmed that the act creating the Probate and Criminal court of Cass county was *in force* when the constitution took effect. So that it would seem clear beyond question, that the constitution, by continuing the existence of the Common Pleas court of Cass county, until the expiration of the present term of the judge thereof (which will not occur until 1878), and by continuing *in full force* the law which gave that court its being, necessarily, and by inevitable implication, accomplished the virtual repeal of the act establishing the court whose existence is now being considered. Because the law which professedly abolishes the Common Pleas court, professedly creates the Probate and Criminal court. Both cannot, nor were they intended to co-exist.

This view is further strengthened by another section (§ 4, p. 43) of the schedule, which provides that "all criminal courts organized and existing under the laws of this State, and not specially provided for in this constitution, shall continue to exist until otherwise provided for by law." For by thus specifying and singling out such criminal courts only as were "*organized and existing*," the framers of the constitution must be presumed to have had in mind the whole subject, and to have intended to continue such criminal courts *alone*, as had an *actual* and not a mere *potential* existence.

This construction accords well with a very familiar rule, that the expression of one thing is the exclusion of another. (Dwarris on Stat., 605.) "Affirmative specification excludes implication." (Id. 605, and cas. cit.) And this construction is in harmony also with the preamble to the schedule. The evident idea of the framers of the constitution as expressed in that preamble was to pre-

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vent inconveniences from arising in consequence of a change in the organic law ; and as the most natural and most feasible method of accomplishing this, they recognized and upheld the *existing order of things* ; recognized and upheld all courts and officers whom the constitution, on its adoption, found in the exercise of judicial or official functions.

This is shown in the clearest and most unequivocal manner by the sections already quoted, and by similar ones scattered all through the constitution, expressive of the same idea, and speaking in effect the same language.

Again, the meaning we have attached to the fifth section of the schedule, as to the continued existence of the third class of common pleas courts, is the same as that attached thereto by the makers of the constitution themselves, as shown by their contemporaneous construction thereof contained in their address to the people of this State. But the language of that section is so plain as to obviate, it would seem, all necessity for construction. This being the case, we have but to reiterate the conclusion before announced, that the law establishing the Probate and Criminal court of Cass county, never became operative nor possessed the force and validity of a legal enactment, in consequence of being repugnant to, and inconsistent with, that provision of the constitution which gave recognition and continued existence to the Common Pleas court of that county.

II.

We are thus led to the discussion of our second point, and respecting this there would, owing to the disposition made of the first point, appear to be but little difficulty. Numerous cases can be instanced from the books, where the acts of an incumbent of an office have been held valid, upon the ground that such incumbent was an officer *de facto*. But an officer of that description necessarily pre-supposes *an office* which the law recognizes. And a quite extensive research has failed to discover an instance where an incumbent has been held an officer *de facto*, unless there was a *legal office* to fill ; and all the cases cited from our own reports were of that sort.

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If our first announced conclusion be correct it must needs follow that there was no such office or court known to the law as the Probate and Criminal court of Cass county; and that consequently the conviction of the petitioner was altogether *coram non jndice*.

III.

In relation to the third point, the law is well settled, that if the petitioner has been committed by a court or person having *absolutely no jurisdiction*, then the validity of the commitment may be determined on *habeas corpus*. (Hurd on Hab. Corp., 331 *et seq.*, and *cas. cit.*)

It does thus clearly appear in the present instance, and the result is that the petitioner is entitled to his discharge, and it is so ordered.

The other judges concur.

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F. W. BIEBINGER, Respondent, vs. M. R. TAYLOR, et al., Appellants.

1. *Attorney, neglect of.*—The neglect of an attorney is that of his client.
2. *Practice, civil—Default—Motion to set aside—Failure to docket case—Note—Affidavit as to usury and want of consideration, etc.*—On motion to set aside default on a note, defendants' affidavit merely showed that the clerk failed to docket the case, and that the attorneys could not find the papers, and it did not appear that the attorneys ever made search for them, or called on the clerk or sheriff for them, or that their production was necessary to a defense; and the evidence showed that defendants were duly served with a copy of the petition, and had ample time within which to answer; and the defense proposed to be set up was merely that plaintiffs acquired the note after maturity and without consideration, and that usurious interest was incorporated into the note. (See Wagn. Stat. 782, § 5.) *Held*, that the motion and affidavit were without merit—and *a fortiori*, where such proposed defense was neither set out or alluded to in the affidavit.

Appeal from Jackson Co. Special Law and Equity Court.

Tichenor & Warner, for Appellant, cited: Wagn. Stat. 1061, §§ 20, 22; *Adams vs. Hickman*, 43 Mo. 168; *Eidenmiller vs. Kump*, 61 Mo. 340; 24 Iowa, 150; *Castlio vs. Bishop*,

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51 Mo. 162; Kelly vs. Hogan, 16 Mo. 215; McAdams vs. McHenry, 22 Mo. 413; Stacker vs. Cooper Ct. Ct., 25 Mo. 401; Doan vs. Holly, 27 Mo. 256.

J. Brumback, for Respondent, cited: Campbell vs. Gaston, 29 Mo. 345; Bailey vs. Clayton, 20 Penn. St. 297; Lamb vs. Nelson, 34 Mo. 502; Florez vs. Uhrig's Adm'r, 35 Mo. 520; Farmers and Mechanics Nat. Bank of Buffalo vs. Dearing, 2 Cent. Law. Jour., 755; Farmers and Traders Bank vs. Harrison, 57 Mo. 506; Crocker vs. First National Bank, 3 Am. Law Times, 350; S. C., 3 Cent. Law Jour. 527; Kribben vs. Eckelcamp, 34 Mo. 480-482; Bosbyshell vs. Summers, 40 Mo. 172; Boernstein vs. Heinrich, 24 Mo. 26; Ridgley vs. Steamboat Reindeer, 27 Mo. 444; Field vs. Matson, 8 Mo. 686; Kerby vs. Chadwell, 10 Mo. 393; 59 Mo. 522; Wagn. Stat. 1036, § 19; Id. 1034, § 5; Downing vs. Still, 43 Mo. 309; Doan vs. Holly, 27 Mo. 256.

SHERWOOD, Judge, delivered the opinion of the court.

Action on promissory note for \$3,000 originally made payable to the Kansas City National Bank.

The defendants were duly and personally served, the writ being made returnable on the first Monday in November, 1874, that being the second day of the month.

Court was in session on that day, and then adjourned to the ninth day, or second Monday of that month, and was in session on that day, as well as on the 10th, 11th and 12th next following. The judgment by default was taken against defendants on the 11th, and on the 12th they appeared by their attorneys and filed a motion, supported by the affidavit of one of their number, to set the default aside, tendering at the same time an answer to the petition.

The papers thus referred to are as follows: Defendants move to set aside the judgment rendered herein by default, and for leave to answer, for the following reasons: 1. Because said cause, though returnable to this term of the court, was not, by the clerk thereof, put either upon the law docket or court

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docket of said court, and it was not so put upon said dockets until after one week after the first day of November term, 1874; 2. that said papers in this cause were not returned to this court by the sheriff until over one week after the first day of the term; 3. that defendants' attorneys, employed by them to defend this cause, came to this court on the second Monday of said term, and upon looking for this cause did not find the same upon the dockets, or either of them, for the reason that they were not upon the same, and did not find the papers in the cause, for the reason that they had not yet been returned to this court; 4. that for reasons herein set forth, defendants failed to answer, and were not by the law required to answer; 5. defendants have a meritorious defense to plaintiff's action;

Woodley G. Taylor being duly sworn, says he is one of the defendants, and that this cause was returnable to this term of court, and although so returnable, was not docketed by the clerk before the commencement of the term, and was not so docketed upon either of the dockets, required by law to be kept, until the second Monday of this term, and until the evening of said Monday; that the papers in this cause were not returned to this court until the evening of said second Monday; that upon the morning of said second Monday, and up to 2 P. M. of said day, the attorneys of said defendants were in attendance upon this court, but could not find the papers in this cause in the clerk's office, and could not find the case upon either of the dockets of this court, for the reason that it was not upon either of said dockets; and affiant says neither he nor his attorneys did know of the docketing of this cause upon the dockets, or either of them, of this court, until after default had been rendered; that affiant has a meritorious defense to this action and employed attorneys, before the term of this court, to defend the same.

WOODLEY G. TAYLOR.

Subscribed and sworn to before me, this 12th day of November, 1874.

WALLACE LAWS, Clerk.

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Defendants admit the execution of the note sued upon, but deny that the payee of said note either transferred or indorsed or delivered such note to plaintiffs before the maturing thereof, but say it was so indorsed and transferred to said plaintiff after the maturing of said note, and without any consideration for the same; and defendants state that the sum of sixteen dollars of the face of said note is usurious interest, and that the interest is included in the face of said note at the rate of one per cent. per month, wherefor defendants demand judgment.

The motion was taken up and overruled on the day of its filing, and defendants have appealed.

We have discovered no error in the action of the trial court. The defendants, having been duly served with process, were possessed of personal knowledge of the pendency of the suit against them. But they seem to have been more desirous of incurring than of escaping a default, since it does not appear from the affidavit that the attorneys ever made any search for the papers in the clerk's office, or ever called upon either clerk or sheriff for them. Nor does it appear that the production of the papers was at all necessary to a defense, because defendants, who were sued as partners, were in possession of a copy of the petition, and could have readily framed their answer therefrom. And if this were not so, they could have applied to the court for the production of the papers, for the docketing of the cause, and, if necessary, for time to plead; but this their attorneys failed to do, and their neglect must be deemed that of their clients. (*Gehrke vs. Jod*, 59 Mo. 522, & cas. cit.)

In addition to what has been already said, it will have been observed that the "meritorious defense" mentioned in the affidavit is a mere conclusion of law, as the facts which constitute it are not set forth. Nor is the answer which is filed in conjunction with the motion and affidavit at all mentioned or referred to in the latter, as being the answer on which the defendants would rely in the event their motion should prevail.

In *Campbell vs. Gaston* (29 Mo. 345) it was held, that "in all cases of this kind there should be an affidavit of merits, and that

there has been due diligence." And to the same effect are other adjudications of this court.

But even should we hold that the affidavit refers to the answer, still no diligence whatever is shown in respect thereto, nor do we regard the answer as setting up a meritorious defense, as the execution of the note sued on is admitted, and it does not concern defendants that plaintiff acquired the note without consideration, since it may have been indorsed to him for the purpose of collection.

As to the plea of usury, this is no defense to the action, since a recovery is still had, notwithstanding such plea; for so the statute provides. (Wagn. Stat. 782, § 5.) But such a plea is certainly not a "meritorious defense," and we will not, therefore, undertake to state what our conclusions would have been had the defendants exhibited any promptitude in making such a plea.

In conclusion, the defendants were duly notified of the pending action, and had ample time to make their defense; and we regard the mere fact that the clerk failed to docket the cause until the second Monday of November, as an omission which did not work them any substantial prejudice, and we are expressly prohibited from reversing any judgment unless we believe this to have occurred. (Wagn. Stat. 1067, § 33.)

There is no merit in this appeal, and the judgment is affirmed with four per cent. damages. Judge Napton absent. The other judges concur.

—o—

STATE OF MISSOURI, Respondent, vs. JOHN W. ALLEN, Appellant.

1. *Indictment—Murder—Presence of prisoner—Failure of record to show.*—Where it does not appear affirmatively that the prisoner was present during the entire trial of an indictment for murder, or to show the presence of the jury during the hearing of evidence, such errors will work a reversal of the cause.
2. *Instructions—Faults in.*—Instructions should not be repetitions nor commentaries on the evidence.

Appeal from Greene Circuit Court.

State v. Allen.

John G. Wear, C. W. Thrasher, with H. C. Young, for Appellant, cited: State vs. Ware, 61 Mo. 232; State vs. Buckner, 25 Mo. 167; State vs. Cross, 27 Mo. 332; State vs. Schoenwald, 31 Mo. 147; State vs. Browning, 36 Mo. 397; State vs. Mathews, 20 Mo. 55; State vs. Barnes, 59 Mo. 154; State vs. Ott, 49 Mo. 326.

J. L. Smith, Atty Gen'l, for Respondent, cited: State vs. Underwood, 57 Mo. 40; State vs. Brown, 63 Mo. 439.

NORTON, Judge, delivered the opinion of the court.

Defendant was indicted in the circuit court of Lawrence county, for murder in the first degree for killing one George Riddle, in August, 1875. On the application of defendant, a change of venue was awarded to the circuit court of Greene County, in which court defendant was tried at the November term, 1876, thereof, and convicted of murder in the second degree.

Numerous exceptions were taken to the admission and rejection of evidence, the giving and refusing instructions, which are relied upon here as causes for the reversal of a judgment. It is also insisted that the record in this case fails to show affirmatively the presence of the prisoner during the progress of the trial.

If this last objection is well founded, it necessitates a reversal of the judgment, under repeated decisions of this court, no matter how well and properly it may have been tried in all other respects. The necessity for the record showing affirmatively the presence of the prisoner, whose liberty and life are in peril, during the trial of the question whether he shall be deprived of either, has been so often and so clearly and plainly expressed by this court in numerous cases, covering a period of more than twenty years, that it constitutes criminal neglect on the part of those charged with the duty of making up these records, and those charged with the duty of seeing that they are properly made up, when the record fails to show this fact so necessary to sustain any judgment which may be rendered in such case.

The record proper in this case shows that on the 27th day of November, 1876, a jury was impaneled and sworn, and that de-

fendant was then in court, and that on the swearing of the jury, for want of time to try on that day, the cause was continued till the next morning—the defendant being committed to the custody of the sheriff. The record proper does not show what disposition was made either of the prisoner or jury after this adjournment. It does not show that either the prisoner or jury were in court the next day after the jury were sworn, or at any other time, or that there was a trial of the case, or that any evidence was given before the jury on the next day after they were sworn, or any other day.

The only statement that is made upon the subject is made in the bill of exceptions. The bill of exceptions, after reciting all the evidence and fifteen pages of closely written instructions given and refused, and numbering forty-three, contains the following statement:

“Under the instructions given by the court, the jury found the defendant guilty of murder in the second degree.

‘We the jury find the defendant, John W. Allen, guilty of murder in the second degree as charged in the indictment and assess his punishment at imprisonment in the State penitentiary for term of twenty years.’

J. W. HATFIELD, Foreman.

And on the same day in which the said jury returned their said verdict to-wit: on Saturday, the 2d day of December, 1876, the court rendered judgment in this cause.”

The following is a literal copy of the judgment thus recited, so far as it is copied:

“And now at this day comes again as well the prosecuting attorney who prosecutes for the State of Missouri in this behalf, as the said John W. Allen in his proper person, who was brought to the bar of the court in the custody of the sheriff aforesaid, impaneled as aforesaid in this behalf, also come under charge of the sheriff and thereupon the jurors aforesaid, upon their oath aforesaid, do say:

‘We the jury, etc.’ (see remainder of verdict *supra* 82.) It is therefore considered by the court that the said John W. Allen be imprisoned in the penitentiary of the State of Missouri

Reynolds v. M., K. & T. Rly Co.

for and during the period of twenty years and that he be taken hence, etc."

Taking the whole record and neither the jury impaneled to try the defendant, nor the defendant, appear anywhere in it from the 27th of November to the second of December. Although the bill of exceptions contains the evidence of twenty-seven witnesses, the record fails to show that the evidence was given before the jury or in the presence of the prisoner.

For these manifest errors the judgment will be reversed.

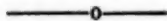
(State vs. Matthews, 20 Mo. 55; State vs. Buckner, 25 Mo. 167; State vs. Cross, 27 Mo. 332; State vs. Shoemaker, 31 Mo. 147; State vs. Browning 36 Mo. 397; State vs. Ott, 49 Mo. 326; State vs. Barnes, 59 Mo. 154; State vs. Jones, 61 Mo. 232.)

The following cases have been decided at the present term enunciating the same principle as in the above.

State vs. Montgomery, 63 Mo. 296; State vs. Barnett, 63 Mo. 300; State vs. Cheek, 63 Mo. 364; State vs. Dooley, 64 Mo. *post*.

We will not notice the forty-three instructions given and refused in this case, except to say that many of them are but repetitions of others, while others are more in the nature of commentaries on the evidence than of instructions declaring a principle of law applicable to the case, two evils to be guarded against on a re-trial of the case.

Judgment reversed and cause remanded, in which the other judge concur.



M. REYNOLDS, Respondent, vs. M., K. & T. RLY. Co., Appellant.

1. *Justice of peace—Judgment—Motion to set aside computation of time.*—In computing the ten days' time within which a motion to set aside a default before a justice of the peace may be made (Wagn. Stat., 847, § 2), the first day after the rendition of the judgment should be excluded and the last included. Thus the judgment being rendered Oct. 28th, motion filed Nov. 7th was held to be in time.

Appeal from Howard Circuit Court.

John Montgomery, jr., for Appellant, cited : Wagn. Stat., 1872, p. 88, § 6 ; Hahn vs. Dierkes, 37 Mo. 574 ; Patrick vs. Faulke, 45 Mo. 313 ; Schubert vs. Crawley, 33 Mo. 564 ; Littleton vs. Christian, Adm'r, 11 Mo. 393 ; Kimm vs. Osgood's Adm'rs, 19 Mo. 61.

G. C. Major, Jr., for Respondent, cited : Patchin vs. Bon-sack, 52 Mo. 431 ; Robinson vs. Walker, 45 Mo. 117-119 ; State *ex rel.* vs. Gasconade County Court, 33 Mo. 102.

SHERWOOD, Judge, delivered the opinion of the court.

Plaintiff brought action and recovered judgment before a justice of the peace against the defendant, for killing certain horses. Judgment was rendered on the 28th day of October, 1874, and on the 7th day of November next thereafter, the motion of defendant to set aside the default was overruled as not being made in time, and this is the only question presented. Wagn. Stat., 847, § 2, requires that one moving to set aside a default, should do so within ten days after rendition of judgment.

The fourth sub-division of Wagn. Stat., (p. 88, § 6) prescribes that "the time in which an act is to be done, shall be computed by excluding the first day and including the last." Applying this statutory rule, no hesitancy is felt in holding that defendant's motion was made within the ten days. (Hahn vs. Dierkes, 37 Mo. 574 and *cas. cit.*)

The result is, that the judgment must be reversed, and the cause remanded ; Judge Napton absent ; the other judges concur.

Saline County v. Sappington, et al.

SALINE COUNTY, Plaintiff in Error, vs. B. SAPPINGTON, et al.,
Defendants in Error.

1. *Practice, civil—Contract—Omission of seal.—Prayer for reformation—Demurrer.*—An instrument in the form of a bond is good as a contract and constitutes a good cause of action at common law although without seal. And no necessity existing for its reformation to make it such, the fact that the plaintiff's petition prays for reformation of the instrument, so as to make it a specialty, will not warrant a demurrer.
2. *Practice, civil—Prayer for relief not a distinct cause of action.*—A prayer for relief does not constitute a distinct cause of action, but only seeks a particular remedy and is not demurrable.

Error to Saline Circuit Court.

Samuel Davis, with T. Shuckelford, for Plaintiff in Error, cited: *State ex rel. vs. Frank's Adm'rs*, 51 Mo. 98; *Wiser vs. Blackly*, 1 Johns. Ch. 607; *Young vs. Coleman & Cason*, 43 Mo. 179; *Melching vs. Phillips & Paul*, 49 Mo. 315; *United States vs. Linn*, 15 Pet. 290.

Vest, for Defendants in Error, cited: *Meyers vs. Field*, 37 Mo. 439; *Peyton vs. Ross*, 41 Mo. 257; 2 Mo. 141; 8 Mo. 218-414.)

SHERWOOD, Judge, delivered the opinion of the court.

Action on an instrument executed by Sappington as treasurer of Saline county, and by the other defendants as his sureties. The instrument was not a bond in consequence of lacking the word "seals" in the body thereof.

Breaches were set out, reformation of the instrument so as to make it a specialty, and judgment for the penalty and execution, etc., were asked for. The defendants successfully demurred. There was no insufficiency in the petition. A mere prayer for relief is not demurrable. The instrument sued on was well enough without a seal; was good as a common law contract, made on adequate consideration, (*Henoch vs. Chaney*, 61 Mo. 129) therefore no necessity existed for reformation, and the prayer therefor may be rejected as surplusage. The mere prayer for relief does not constitute a distinct cause of action, but only seeks a particular remedy. (*McClurg vs. Phillips*, 49 Mo. 315.)

Judgment reversed, and cause remanded; the other judges concur.

Swearingen v. M., K. & T. R. R. Co.

E. SWEARINGEN, Defendant in Error, vs. M., K. & T. R. R. Co.,
Plaintiff in Error.

1. *Damages—Killing of stock in unfenced depot grounds.*—To entitle plaintiff to recover against a railroad company under § 5 of the Damage Act (Wagn. Stat., 250) for the value of stock killed in open and unfenced depot grounds, he must prove negligence in defendant. Such open spaces seem to be regarded as in a measure dedicated to public use, and somewhat in the nature of public highways, and therefore within the exception of the statute. (See *Morris vs. St. L., K. C. & N. R. R.*, 58 Mo. 78.)

Error to Howard Circuit Court.

John Montgomery, Jr., for Plaintiff in Error.

It has uniformly been held by the Supreme Court that this statute does not apply to such places as depot grounds, and that railroad companies are not required to fence at such places. (*Lloyd vs. Pac. R. R. Co.*, 49 Mo. 200; *Morris vs. St. L., K. C. & N. R. R. Co.*, 58 Mo. 81; *Stoneman vs. Atl. & Pac. R. R. Co.*, 58 Mo. 505; *Karle vs. Kansas City, St. Joe. & C. B. R. Co.*, 55 Mo. 483.)

There is nothing in the opinion of the court in *Tiarks vs. The St. Louis & Iron Mountain R. R. Co.* (58 Mo. 50), in conflict with these decisions. The facts in that case were entirely different from the case here presented, and the law there declared was unquestionably proper upon the facts before the court.

The case of *Holman vs. C., R. I. & Pac. R. R.* (62 Mo. 562) fully sustains the position of plaintiff in error.

Herndon & Herndon, for Defendant in Error.

Under the 5th section of Damage Act, upon proof of the killing of the stock at the depot grounds, negligence was presumed and should be rebutted with proof by defendant. (*Tiarks vs. St. L. & I. M. R. R.*, 58 Mo. 45; also *Wagn. Stat.*, 520, § 5.)

HOUGH, Judge, delivered the opinion of the court.

This was an action to recover the value of certain live stock killed by the cars of defendant at Estil Station, in Howard county. The record has been prepared, and certified by the judge of

the circuit court, in conformity with rule sixteen of this court, and contains the following statement of the proceedings of the trial:

"The plaintiff introduced evidence tending to show that on the night of the 16th day of April, 1874, the stock described in the petition were killed by a train of cars operated by defendant, upon its road at Estil Station, in Howard county; that they were his property, and of the value of \$380; that the injury occurred in the night time, and that the stock appeared to have been killed north of the depot and within the switch limits; that the place where the stock was killed was left open for the transaction of the business of the railway company and the public, and was necessary for that purpose.

Defendant asked an instruction that upon the evidence the plaintiff could not recover. This the court refused to give, holding the action was brought under the fifth clause of the Damage Act, and upon proof of the killing or injury of the stock at this point, negligence was presumed, and should be rebutted with proof by the defendant. To which ruling defendant then and there excepted, at the time.

Defendant introduced evidence tending to prove that the defendant was not guilty of any negligence, and plaintiff then introduced evidence tending to prove negligence.

The cause was submitted to the jury upon instructions which declared that upon proof of the killing and injury, the law presumed the company guilty of negligence, where the damage was done at a point on the road where the defendant was not bound to fence, and unless the defendant overcame the *prima facie* case or presumption, by proof to the satisfaction of the jury that they were guilty of no negligence, the jury should find the issues for the plaintiff.

The court also gave the following instructions asked for by plaintiff, viz: "If the jury believe from the evidence that the horses, mules or colts, or any of them, the property of the plaintiff, were killed by the locomotive and train of cars of defendant, at a point on said road where the law does not require fences to be erected, the law raises the inference of negligence, and the defendant is liable for the value of the stock so killed, unless the

evidence shows that the defendant was not guilty of negligence." "The killing of the stock being proved, it devolves upon defendant to prove to the satisfaction of the jury that defendant was not guilty of negligence."

The defendant duly excepted to the giving of these instructions. The jury found a verdict for plaintiff. The defendant filed its motion for a new trial, which was overruled, to which ruling it duly excepted.

We have omitted from the certified statement an instruction as to the measure of damages, and one relating to the credibility of witnesses, as they have no bearing on the point in controversy.

The fifth section of the damage act under which this action was brought, provides, in substance, that when any animal shall be killed by the locomotive or cars used on any railroad in this State, the owner may recover the value of such animal without any proof of negligence on the part of the servants of the company operating such road; but it is further provided that this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway.

The question presented for our determination is, whether in actions against a railroad company brought under this section, a recovery can be had without any proof of negligence on the part of the servants of the company, when the animals are killed in the open and unfenced depot grounds of such company, it being admitted to be necessary for the transaction of its business with the public, that such grounds should be left open. This identical question was considered and decided by this court in the case of *Lloyd vs. Pacific Railroad*, (49 Mo. 199.) It was there held that railroad companies are under no obligation to fence such portions of their depot grounds as the business of the companies and the public convenience may require to be kept upon and uninclosed, and that for stock killed at such places the companies are only liable upon proof of negligence; that in such cases, no presumption of negligence arises from the simple fact of the killing.

This ruling was subsequently approved in the case of *Morris vs. St. L., K. C. & N. R. R.*, 58 Mo. 78.

Swearingen v. M., K. & T. R. R. Co.

Such open spaces being assigned for the free use of the public, having business with the companies, seem to be regarded as in a measure dedicated to public use, and somewhat in the nature of highways, and therefore within the exceptions of the statute. To fence them up, in towns and villages, would, in the language of this court, in *Lloyd vs. P. R. R.* be to "commit a public nuisance," to render it inconvenient, if not almost impossible, for the companies to perform the office of their creation.

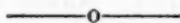
To support the action of the court below, the opinion of Judge Wagner in the case of *Tiarks the St. L. & I. M. R. R.*, 58 Mo. 45, is relied upon. Indeed one of the instructions given at the trial, is couched, in part, in the very language of the opinion in that case. It was there said "By that section, (the 5th section of the Damage Act) if the road is not fenced and animals are killed at a place where the law does not require fences to be erected, the law raises the inference of negligence and the corporation will be liable." This language when wrested from its context and construed without reference to the facts of that case, undoubtedly supports the claim of the plaintiff.

Such a mode of interpreting judicial writings, however, it need hardly be said, is wholly inadmissible.

The plaintiff in that case brought his action under the forty-third section of the railroad corporation law to recover, as provided therein, double the value of certain stock, killed at a point on the railroad where there was no fence, and where the road passed through *uncultivated and uninclosed cleared land*. This court held that the defendant was only bound to erect fences, where its road passed through or by inclosed or cultivated fields or uninclosed prairie lands, and that the plaintiff could not maintain his action under that section; that unless the killing takes place where the statute makes it obligatory on the roads to fence, double damages cannot be recovered. Proceeding then to say that the plaintiff should have brought his action under the 5th section of the Damage Act, the language was used which we have heretofore quoted. And when it was said that the law raises the inference of negligence from the killing of animals where there is no fence, and where the law does not require fences to be

erected, references are unquestionably made to places where fences might legally and properly be erected, and not to public highways or to depot grounds. The design of the 5th section of the Damage Act, was, Judge Wagner remarked, "to furnish an inducement for the roads to fence their track where it was not deemed absolutely necessary to compel them to do so." Most certainly he did not thereby intend to say that it was designed to induce them to fence public highways and depot grounds; yet such a construction would have to be put upon his language to justify the action of the circuit court in this case.

For error committed in giving instructions, the judgment will be reversed, and the cause remanded; the other judges concur.



RUSH C. OWEN, Respondent, vs. JOHN P. ELLIS, et al., Appellants.

1. *Evidence—Conveyances—Proof of intention in making.*—Parol declarations as to intentions and purposes in making a deed are inadmissible.
2. *Wills and deeds—Interest and power—Construction, question of intent.*—In the construction of both wills and deeds where there is an interest and also a power, the decisive question is as to the intent of the grantor or testator.
3. *Will—Deed under will execute power, when.*—Where one having under a will an interest in land, coupled with a power, makes a deed for a valuable consideration, and as a conveyance of the donee's interest, the instrument cannot have the effect intended, it will be considered as an execution of the power, although no reference is made to the power.
4. *Will—Deed under by widow—When construed as execution of power—Payment of debts—Implied power of sale for—Signature of executrix.*—By the terms of a will, a life estate in testator's lands was vested in the widow "my just debts first to be paid," and "the property never to go out of the family in any other way than to pay debts, or for the ordinary expenses of the family." At an advanced age, and for value, she conveyed a certain portion of the lands (which were unimproved and wild) by a fee simple warranty deed, in the usual form, but signing herself as executrix: *Held*,
 - 1st. Her signature as executrix was merely a *descriptio personae*.
 - 2nd. *Semble*, that in view of the provisions of our statute touching administration, and in the absence of more specific provisions in the will relating to sale of lands for payment of debts, the clause "my just debts first to be paid" would not be construed as conferring an implied power for that purpose.

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3rd. Her intention was manifestly to convey an absolute title, and it was very doubtful whether any reference to the power was necessary, but at all events very slight circumstances would justify an application of the deed to the power, and not to the life estate, and the grantee under her deed would then take a fee simple title.

Appeal from Green Circuit Court.

John P. Ellis, for Appellants.

I. In *Owen vs. Switzer*, (51 Mo. 322) the deed purported to be the individual act of Louisa T. Campbell, and the court held it was her individual deed and conveyed her individual estate.

Here the deed purports to be the act of the executrix of the estate of John P. Campbell—and hence it should have effect as the deed of an executrix, and should convey such estate as the executrix could, under the will, convey. Now as executrix, Mrs. Campbell could not convey her own life estate. She, in that capacity, could only convey the fee; so that in order to give any meaning or effect to the conveyance as the act of an executrix, it must have vested the fee simple to the lands in controversy in John Lair, and constitute a bar to plaintiff's action.

A reference either to the will or to the powers therein contained, is sufficient to give effect to the deed as an execution of the powers in the will. (*Pease vs. Pilot Knob Co.*, 49 Mo. 124; *Littleton vs. Addington*, 59 Mo. 275; *Turner vs. Timberlake*, 53 Mo. 378; citing *Blagge vs. Miles*, 1 Sto. 427; *Jay vs. Stein*, 49 Ala. 514-524; *Clark vs. Haranthall*, 47 Miss. 434; *Drusadow vs. Wilde*, 63 Pa. [St.] 170; *Raine vs. Beckett*, 30 Ind. 154-163.) The language "executrix of the estate of John P. Campbell, deceased," is *ex vi termini* a reference to the will.

The words "my just debts to be paid first," are an implied charge on the real estate of the testator, which in the failure of the personal property to satisfy the debts, raise a power in the executrix to sell the lands to pay the debts. (2 Sto. Eq. Jur. § 1246; *Clark vs. Hosenthall*, 47 Miss. 434; 2 Jarin. Wills, 512, *et seq.*; *Foster vs. Craig*, 2 Dev. & Bat. 209; 1 Sto. Eq. 428 *et seq.*)

McAfee & Phelps. for Respondent.

I. Unless the deed refers to the power in apt and certain words it will not be taken as in execution of it, but will be construed as passing Mrs. C.'s own interest, if she had any interest for the deed to operate upon. (*Pease vs. Pilot Knob Iron Co.*, 49 Mo. 124; *Owen vs. Switzer*, 51 Mo. 322; *Turner vs. Timberlake*, 53 Mo. 371.)

The intention to execute the power must be apparent and clear so that the transaction is not susceptible of any other interpretation. If it be doubtful under the circumstances, then that doubt will prevent it from being deemed an execution of the power. (*Blagge vs. Miles*, 1 Sto. 427 and authorities there cited.)

In *Owen vs. Switzer*, this same will was in controversy. But in that case it was held that the deed to Holland was not an execution of the power. The only difference in the deed in that case and the deed in this case is this: In this case, in the deed, Mrs. C. describes herself in this way: "I, Louisa T. Campbell, Executrix of the estate of John P. Campbell, dec'd, do," etc., and she signs it "Louisa T. Campbell, Executrix," while in the deed to Holland in *Owen vs. Switzer*, these descriptive words are left out, and this is really all the difference in the two cases.

But her power to sell was not at all dependent upon her fiduciary capacity. Without the last clause in the will, appointing her executrix, she would have the same power to sell—she would have had the power to sell without ever qualifying as executrix. (*Owen vs. Switzer*, *supra*, 328; *Hazel vs. Hagan*, 47 Mo. 377.)

Her designation as executrix was mere *descriptio personæ*. (*Lecompt vs. Seargent*, 7 Mo. 351; *Fream & Snowden vs. Camden*, 7 Mo. 298.)

There are no imperfections in the deed of Mrs. Campbell to Lair. It is either an execution of the power, or it is a conveyance of her own estate, and whether it be the one or the other must be determined by Mrs. Campbell's intentions, and her intentions must appear from the language of the deed. (1 Sto. 437; 53 Mo. 378; 51 Mo. 332; 49 Mo. 124; 2 Sto. Eq. Jur., § 1062 and note 1, and authorities there cited.)

Now is it not reasonable to suppose that she would not have made a warranty deed if she wished merely to execute a power?

It is neither proper nor customary for persons executing powers to warrant the title. Hence, the fact of this being a warranty deed is no evidence of an intention to execute the power. The deed in *Owen vs. Switzer* and *Pease vs. Pilot Knob Iron Co.* were both warranty deeds.

NAPTON, Judge, delivered the opinion of the court.

In this action of ejectment the facts vary but little from those in the case of *Owen vs. Switzer*, (51 Mo. 322) for which reference is made to the printed report of that case. The deed in this case from Mrs. Campbell to Lair, under whom defendants hold, differs from the deed in the case referred to in Mrs. Campbell describing herself both in the beginning and signature of the deed as "executrix of the estate of John P. Campbell, deceased." It is signed by "Louisa T. Campbell, executrix." It was in the ordinary form of a conveyance in fee simple, and purported in consideration of \$1,200 dollars, the receipt of which is acknowledged, to convey one hundred and twenty acres of land. The statutory words "grant, bargain, and sell" are used, and the deed purports to convey to Lair and his heirs and assigns, in fee simple forever, to their own proper use and behoof," and contains an express covenant of seizin of an indefeasible estate in fee simple, and a covenant against incumbrances and of general warranty.

The will of Jno. P. Campbell is set out at length in the report of the case referred to, and need not be repeated here. John P. Campbell died in 1851 and the deed of Mrs. Campbell was made on the 16th September, 1854.

Evidence was offered at the trial of conversations had with Mrs. Campbell, a month or so after she had conveyed to Lair, in regard to her intentions in that sale, and her understanding of the effect of that deed. This evidence was excluded. It was proved that the land was worth about ten dollars an acre in 1854. Mrs. Campbell's death occurred before the commencement of the action. The court expressed the opinion that the deed contained

no reference to the power given Mrs. Campbell in the will, and as she had a life estate, upon which the deed could operate, the deed only carried the life estate, and therefore the plaintiffs who were heirs of John P. Campbell were entitled to recover, and the judgment accordingly was for the plaintiffs.

In examining the questions presented by this case we may dismiss from further consideration, all the parol evidence offered on the trial of Mrs. Campbell's declarations in regard to her purposes and intention in making the deed. The inadmissibility of such testimony is so well established, that a citation of authorities is deemed unnecessary.

It seems to be established by all the authorities, both English and American, that in the construction of both wills and deeds, where there is both an interest and a power, the decisive question is as to the intent of the grantor or testator. Chancellor Kent says: "In construing the instrument in cases where the party has a power and also an interest, the intention is the great object of inquiry, and the instrument is construed to be either an appointment or a release; that is, either as an appointment of a use in execution of a power or a conveyance of the interest, as will best effect the predominant intention of the party." (4 Kent. Comm. 336.)

If we were at liberty to discard certain arbitrary rules, which have been established by the courts in England, and followed to a great extent in this country, to ascertain the intention of the donee of a power, and simply inquire, without reference to any rules on the subject, what was Mrs. Campbell's intention in making this deed, but one answer, we imagine, could be made. We might safely say, as Lord Wynford said in the House of Lords, when the Roake's cases were before it (1 Dow. & Clark, 451) that nine hundred and ninety-nine persons out of a thousand would say on reading the deed, that the grantor did intend to convey a fee simple. We might go further and say that the remaining one of the thousand would come to the same conclusion. And it might be further observed that Lord Wynford's suggestion, that the rules were bad rules, was recognized by the British

Parliament, and some of them were abolished by 1 Vict. ch. 26, § 27, in which it was enacted that a general devise of real and personal property should operate as an execution of a power of the testator over the same, unless a contrary intention appeared in the will. (4 Kent, note, p. 333.)

The intention of Mrs. Campbell to convey a fee simple is declared on the face of the deed, and is manifested by the most solemn assurances known to the law. But Lord Tenterden said in the *Rouke's* case, that "it is the better course to abide by general rules and principles, and not to be led aside by subtle distinctions and considerations of hardships in particular cases; otherwise one inconsistency will occur after another and the end will be inextricable confusion."

Recognizing the propriety of this remark, and not being aware of any legislation on the subject here, we proceed to inquire what these rules are, to what classes of cases they have been applied, and to what extent, if any, they apply to the case under consideration.

In *Blagge vs. Miles*, (1 Sto. 427) the rules applicable to the construction of instruments by the donee of a power are stated to be these: 1. There must be some reference to the power, or 2nd, a reference to the property which is the subject on which it is to be executed; or 3rd. The case must be one where the provisions in the will or other instrument executed by the donee of the power would otherwise be ineffectual, or a mere nullity; in other words, would have no operation except as an execution of the power.

The second of these rules would seem to apply mainly to wills, when there has been a specific devise of lands or a specific bequest of personal property which would only be good by reason of a power given to the testator to devise or bequeath, in which case, the naming of the subject matter of the power is equivalent to a reference to the power itself, and where thus limited, it resolves itself into the third rule. And in regard to deeds or other instruments *inter vivos*, the property, which is the subject of the power, is necessarily referred to, and whether the deed will carry the whole estate under the power, or the limited estate which the

donee may have, is left to be determined by other rules. So that the third rule stated by Judge Story seems to be a mere reiteration of the second.

The modern English cases appear to rest on a decision of Lord Thurlow, who said that "to execute the power it must be impossible to impute to the testator any other intention than that of executing it."

In the case of Doe vs. Roake, first decided by Lord C. J. Best in the common pleas (2 Bing. 497) upon a review of all the authorities, and subsequently by the King's Bench (5 Barn. & Cress. 730), and finally by the House of Lords (1 Dow & Clark. 451), it was established that an express declaration of an intent to execute a power was unnecessary.

The judges, however, seem to have held that, even if the testatrix meant to give the lands in controversy, it did not necessarily follow that she meant to execute a power which she had to give them. This position is controverted by Sir Edward Sugden, whose opinion may be regarded as very high authority, since his work on Powers was sanctioned by him after he attained a position on the bench under the title of Lord St. Leonards. His remarks are: "The principle attempted to be established viz: that there must not only be an intention to dispose of the property, but also to dispose of it under the power, was strongly observed upon in argument at the bar of the House of Lords, and the author who had to sustain the decision, felt himself unable to support the doctrine advanced in the judgment. If the intention to pass the property can be collected, it will pass under the power, although the donee supposed it would work by force of his interest. There is no conflict; he intends the property to pass, and thinks he has all the interest in it, whereas he really has only a power. The intention governs and the power will support the disposition."

Mr. Clance, whose treatise on Powers was subsequent to that of Sir Edward Sugden, seems to concur with Sir Edward Sugden on this point. Referring to Sir Edward Clere's case, which is leading authority upon which all the English courts base their opinions, he observes: "There are indeed in the case *dicta* apparently to this effect, that if the instrument refer not to the

power and can have some effect by means of the interest of the party, though not all the effect which the words seem to import, still the instrument shall not operate as an execution of the power, the intention being thus contravened. It appears quite clear, however, at this day, and a reference to the authorities will, it is apprehended, show that it has been considered clear for nearly two centuries, that the rule is not thus confined; indeed it may well be asked why, admitting that the intention can be discovered to pass all, the intention should not prevail in the one case, as well as in the other; what rule of law or construction would be thereby violated? The above position was not necessary to the decision of the case, and upon looking more closely into the point, the difficulty in the case put in Sir E. Clere's might be in clearly ascertaining the intention."

The doctrine in Clere's case (6 Coke Rep.) though in the main followed in England, and made the basis of subsequent decisions, was, however, modified, or rather extended, by Lord C. J. Parker, in *Tomlinson vs. Dighton* (10 Mod. 36). In that case the C. J. says: "Suppose a woman seized of an estate for life, with a power to make a lease for three lives, or twenty-one years; she marries, and then she and her husband join in making the lease, and the husband and wife both die before the lease is expired; here, though the husband in right of his wife, and she in her own, are possessed of an estate for life, and therefore can, as owners, make a lease, and there appears no intention of the parties (imagining perhaps that they should have outlived the lease) that this lease should be made by virtue of the power, yet because the lease, supposing it made by them as owners, cannot have all the effect the parties intended, for some it would have (it would be a good lease during the lives of husband and wife), yet because it cannot have all, it shall be esteemed made by virtue of the power."

Upon this case Sir Edward Sugden remarks: "Notwithstanding Sir Edward Clere's case, an intent apparent upon the face of the instrument to dispose of all the estate would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument cannot be otherwise satisfied."

In the case of *Blake vs. Marnell* (2 Ball & Beat. 35) the question was not very unlike the one put by *C. J. Parker*, in *Tomlinson vs. Dighton*. *Blake*, who had a life estate in certain lands, was empowered to borrow £1,500 on the credit of the lands. Having contracted a debt to the amount of £744, he executed by deed to his creditor a rent charge of £150 per annum, until the debt was paid. *Blake* died the year after the rent charge was made, and the question was, whether the deed was an execution of the power, or was derived from the life estate, and consequently terminated at *Blake's* death. Lord *Redesdale*, before whom the case first came on demurrer, observed that, "all cases of voluntary executions of powers are entirely beside the present case, for when a person voluntarily executes an instrument which may have an effect under a power to charge property, he must demonstrate that he meant to execute that power; but when a person acts for valuable consideration, he is understood in equity to engage with the person with whom he is dealing to make the instrument as effectual as he has power to make it; and whenever that is the case, I do not see anything in any of the authorities to raise a doubt that it shall have that effect, so far as the person executing it has power to give it effect, and whenever the nature of the instrument is contrary to what the power prescribes, but demonstrates an intent to charge, it shall have the operation of charging in that form which the power allows."

Lord Chief Justice *Manners*, who finally determined the case, after intimating some doubt as to the rule in *Sir Ed. Clere's* case, and conceding that Lord Ch. Justice *Parker's* opinion in *Tomlinson vs. Dighton*, threw some doubt upon it, declares that "to the cases of creditors and purchasers the doctrine laid down in *Sir Ed. Clere's* case would not apply." Lord *Manners* observes further: "Where a tenant for life with power of leasing, grants a lease for an absolute term, then, although he may eventually have an interest co-extensive with the lease, yet the courts have invariably referred it to the power, in order to give complete validity to it, as in *Campbell vs. Leach* (Ambl. 740), *King vs. Melling*, (1 Ventr. 255) and many other cases that might be referred to. So here the deed provides that the grantee shall have

so much of the rents until the debts and costs are satisfied ; this might have been effected in the life of Blake ; nevertheless it shall, to give validity to the grant, be referred to the power, and is a good charge by virtue of such power."

The case of *Wade vs. Pagil* (1 Bro. Chy. 364) is declared by Sir Edward Sugden to be a remarkable case, and according to his version of it, the inclination of the courts in England to give effect to a settlement in consideration of marriage (which is a valuable consideration) is clearly manifested. In that case the power given in the first settlement was not referred to ; but the settlor recited that he was seized in fee and conveyed as owner, and yet the power was held to be well executed, because the intention was plain to transfer the fee. Yet it was clear that the settlor did not intend to transfer under the power, because he recited his own seizure of a fee. The result was, as Sir Edward Sugden states, that if the estate be conveyed and the settlor's interest will not support the settlement, it will be deemed an execution of the power, although the settlor mistook his title and recited that he was seized in fee of the estate and conveyed it as owner. (1 Sugd. 419.)

The result of these cases, under the singularly subtle and artificial mechanism of the English settlement law, is, that if a person has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power, whether referred to or not. (1 Sugd. 418.)

If the remarks of Lord Redesdale, and subsequently of Lord Mannors in *Blake vs. Marnell*, are to be understood literally, it is difficult to withdraw the present case from the operation of the rule therein established, as it is clear that the defendants were purchasers for value. But Mr. Clance remarks, in regard to the reasoning and decision in *Blake vs. Marnell*, that some expressions occur in that case intimating that a difference might arise according as the parties claiming should be volunteers or not, and he supposes that these remarks were made on the idea that the execution of the power was a defective one, and consequently courts of equity would always interfere in cases of defective exe-

cution where purchasers were concerned, but not in favor of volunteers. (2 Clance, 1622.) Nothing of this kind, however, appears in the report of the case.

But we may be excused from following these cases under the English settlement laws to what we might think their legitimate conclusion, and decline to apply the judgment of Lord Redesdale and Lord Manners, and Lord Ch. Justice Parker and Lord St. Leonards, to the facts of the present case, in view of our previous decision in *Owen vs. Switzer*, and it will not be necessary for us to assume a comprehension of the intricacies and subtleties of English settlements, concerning which Chancellor Kent's observations are forcible and striking. "The doctrine of uses, trusts and powers," observes Chancellor Kent, "is the foundation of those voluminous settlements to which we, in this country, are comparatively strangers, and which in practice run very much into details embarrassing by the variety and complexity of their provisions. Powers are the mainspring of this machinery. The doctrine of settlements has thus become in England an abstruse science which is in a great degree monopolized by a select body of conveyancers, who, by means of their technical and verbose provisions reaching to distinct contingencies, have rendered themselves almost inaccessible to the skill and curiosity of the profession at large. Some of the distinguished property lawyers have acknowledged that the law of entails in its present mitigated state, and great comparative simplicity, was even preferable to the executory limitations upon estates in fee. Settlements, with their shifting and springing uses, obeying at a remote period the original impulse, and varying their phases with the change of persons and circumstances and with the magic wand of powers, have proved to be very complicated contrivances; and sometimes, from the want of due skill in the artist, they have become potent engines of mischief planted in the heart of great landed estates. These domestic codes of legislation are usually applied to estates which necessarily require, under the English law of descents, very extended and complex arrangements, and which can well bear the weight of them. They seem to be indispensable in opulent communities to the convenient and safe distribution of large

masses of property, and to the discreet discharge of the various duties flowing from the domestic ties, and the evils are probably after all, greatly exaggerated by the zeal and philippics of the English political and legal reformers."

Conceding, then, that there might be, and perhaps should be, some hesitation in treating the present case as falling within the principles of the cases cited, we pass on to the consideration of the principal point discussed at the bar in this case, in which it is supposed to be distinguishable from the case of *Owen vs. Switzer*.

Mrs. Campbell describes herself as "executrix of the estate of John P. Campbell, deceased," and signs her name to the deed as "Louisa T. Campbell, executrix." So far as the efficiency of the deed is concerned, these words are manifestly mere *descriptio personae*, mere surplusage, and the conveyance would operate as well without them as with them. She had no power to convey as executrix, for no such power was contained in the will.

The clause in the will which uses the terms, "my just debts first to be paid," would hardly be construed as an implied power given to the executrix to sell land for the payment of debts, since our statute sufficiently provides for such sales, and the testator had given his wife an express power to raise money by the sale of his lands to meet family exigencies, of which she was to judge. The decisions in England and in some of our States on such a clause would hardly apply, though doubtless here, as well as elsewhere, a testator may authorize his executor to sell lands for the payment of debts, and where such authority is expressly given in a will, it may supersede or be substituted for the specific modes provided by our statute to insure the payment of debts either out of the personalty or real estate of the decedent.

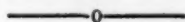
The fact that Mrs. Campbell, as executrix, had no power to convey, leads to the inquiry why such designation was affixed to her name both in the beginning and end of the conveyance. It certainly implies that there was a will of which she was executrix, and that her conveyance was in some way authorized by such will. Whether she was donee of a power to raise money by a sale of land of her deceased husband, as his widow or executrix,

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was doubtless a point upon which she was as ignorant as the lawyer to whom she entrusted the writing of the deed. She was expressly authorized to raise money for the support of herself and her children, by a sale of any of the lands belonging to her deceased husband. In all these lands the will gave her a life estate, which, in wild lands in the interior of Missouri, at the date of the will, might not have been of sufficient value to have attracted her attention. Her intention was obviously to convey an absolute title. A life estate of an old lady in unimproved lands would hardly have been salable unless under execution. The deed purports to convey an absolute title. It refers to the will which gave the grantor this power, though it does not refer to the power.

We think it very doubtful if any reference to the power was necessary in this case, as the manifest intention was to convey a fee simple; but, without so determining, we have no hesitation in declaring that very slight circumstances would justify an application of the deed to the power, and not to the estate (for life) which the grantor had. The reference to the will, though indirect, was sufficient.

The judgment is reversed.



STATE OF MISSOURI, *ex rel.* ATTORNEY GENERAL, Relator, *vs.*
ABRAHAM J. SEAY, Respondent.

1. *Circuit court—Judge of, who may be de facto—Claimant not declared to be usurper in quo warranto, when.*—Where it appears that during the entire term of office one claims to be judge of a circuit court, and acts as such, with the acquiescence of the people of the circuit, he is judge *de facto* and cannot be declared an intruder and usurper in *quo warranto*.
2. *Quo warranto—Allegations as to abandonment of office—What necessary, and what insufficient.*—In *quo warranto* for usurping the office of judge, a general assertion that defendant abandoned the office and engaged in the practice of law is insufficient. The special facts showing his abandonment must be stated. And his practice of law does not in itself, or necessity, amount to an abandonment.
3. *Office of judge, vacancy in—Authority of governor to fill not judicial, but subject to review by the courts.*—Where one was chosen judge under a special election ordered by the governor, his action in directing the election to be

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held may be reviewed and its legality determined in a proceeding in *quo warranto*. The authority conferred on the governor by the Constitution of 1865 (art. 5, § 14) to fill a vacancy, confers no judicial authority.

4. *Office of judge—Term, continuance of till his "predecessor" is "elected and qualified"—"Vacancy"—Meaning of terms under Constitution of 1865—Death of judge elected and qualified, before commencement of his term—Right of predecessor to hold over in case of.*—In November 1868, A. was elected judge of the 14th judicial court. Under the Constitution of 1865 (art. 6, § 14) his term continued till the first Monday in January, 1875, and till his "successor" was "elected and qualified." In November, 1874, B. was elected as his successor, and was commissioned and took and subscribed his oath of office, and was shown to be of requisite age, and otherwise answering the requirements of law. On January 2d, 1875, two days before the commencement of his term, he died. Section 14, *supra*, authorized the governor, in case "any vacancy" should happen by death, etc., to order a new election. *Held*, that B. was qualified as the successor of A. within the meaning of the late constitution. And when so qualified, the right of A. to hold over ceased, and did not revive with his death; that consequently the death of B. created a vacancy, which, under § 14, *supra*, authorized the election of a new judge.
5. *Offices, public, vacancy in—Function of courts and legislature touching.*—The law abhors vacancies in public offices, and in doubtful cases the construction of a law fixing the tenure of such office would be greatly influenced by that consideration. But where there is clearly a *casus omissus*, the courts must leave it to the law-making power to make provision to avoid such consequence.

Quo Warranto.

C. M. Napton, for Relator.

I. The relator insists that there existed no vacancy on the 5th of March, 1875, in said office, and as the governor could order an election only in case of a vacancy, the election of defendant was a nullity.

The Constitution of 1865, Art. 6, § 14, provides that circuit judges "shall be elected for the term of six years, but may continue in office until their successors shall be elected and qualified." The six years for which Gale was elected expired, but as there was no one to succeed Gale he held over, and being rightfully judge at the time the governor ordered an election, the office was not vacant, but filled, by one lawfully authorized to exercise its functions. (See *State vs. Lusk*, 18 Mo. 333.)

McCord died January 2d, two days before the expiration of the six years for which Gale was elected—Gale was certainly judge then. So was he on the first Monday of January, 1875, and during the month for that matter, because McCord had died before entering and being inducted into the office, before his term would have begun. This left Gale judge *de facto* and *de jure*, and he held the office by a full and complete title at the time when the governor ordered an election. (See also, *Comm. vs. Hanly*, 9 Barr, 517 [Penn. St.]; *State vs. McNeely*, 24 La. An. 19.) The death of McCord before January 4, 1875, places the case in the same position as though there had been no election in November, 1874.

Before the court can decide that Seay was legally elected, it must be guilty of deciding that an office is vacant while it is filled; that there can be a vacancy in an office when there is a person in possession, whom all acknowledge to be rightfully in possession, having a perfect right to exercise all the powers and duties of the office, and to receive and enjoy all its emoluments. The mere enunciation of this shows that it would be a legal absurdity. (See 9 Barr [Penn. St.], 513; *People vs. Tilton*, 37 Cal. 614; 18 Mo. 333; *People vs. Whitman*, 10 Cal. 46; 38 Mo. 193.) That there was no vacancy; see further, *People vs. Lord*, 9 Mich. 231; *State, etc. vs. Ralls County Court*, 45 Mo. 58; *People vs. Forquer, Breese* [Ill.], 104; *Pappan vs. Gray*, 9 Paige, 507; *People vs. Van Horne*, 18 Wend. 515; *State vs. McCallister*, 11 Ohio, 51; *Stewart vs. State*, 4 Ind. 396; *Miller vs. Burger*, 2 Ind. 337; *Swails vs. State*, 4 Ind. 516.

The respondent claims that the death of McCord left a vacancy which Gale might, by law, fill until the governor ordered an election, and until the person elected thereat came to take the office.

This would allow the anomaly of "graded vacancies"—vacancies that do not vacate. To speak of Gale's occupying a vacancy until some one came along to occupy it *because it is a vacancy*, is absurd. The very moment it is admitted that Gale might, by law, occupy this vacancy, its vacuity ceased, and the governor's power to appoint or order an election did not attach.

The law, in view of the California, Michigan, Missouri and Pennsylvania cases, undoubtedly means that Gale should hold the office not only during the six year term, but after that and until an elected and qualified successor "presented himself" to take the office. On the day McCord's term was to have begun, he was not an elected and qualified successor. He had been elected and had qualified, but no one can be a successor until he succeeds. Gale was entitled to sit as judge on the 1st Monday of January, because the person elected to succeed was then dead, and the law in ended to cover this very case and prevent a vacancy by allowing the incumbent to hold over.

II. Defendant has not denied enough to avail himself anything, as he admits that Gale was a candidate for the office in 1868, took charge of it the first Monday of January, 1869, and served six years. Gale was therefore *de facto* judge during that time. The governor, the attorney general and the people, as well as his opposing candidate at the election of 1868, all acquiesced in his holding the office, and that is sufficient to make him *de facto* judge. (45 Miss. 151.)

The governor cannot by any act of his oust a *de facto* judge who holds the office. The law points out the remedy. (See opinion of Judge Wagner, in State *ex rel.* Vail vs. Draper, 48 Mo. 213.) And therefore, the governor could not oust Gale by ordering this election, under which Seay claims the office. So that, whether we admit or not that Gale was never elected to this office, it is immaterial, and therefore this part of the answer is insufficient.

But there is another ground for ousting the defendant, which goes to show that Seay is not entitled to this office, even if there were a vacancy, and if Gale had never held the office at all; that is, that there was no authority for the special election ordered by the governor in March, 1875. The term of office of a circuit judge is six years. The Constitution of 1865, Art. 6, § 14, provides, that "if any vacancy shall happen in the office of any circuit judge, the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy; *provided*, that said vacancy shall happen at least six months before the next gen-

eral election for such judge." And further on in the same section: "And the General Assembly shall provide by law, for the election of said judges in their respective circuits, to fill any vacancy which shall occur at any time, at least six months before a general election for said judges." Now the General Assembly has made such a provision, and it is as follows: "In all cases of vacancy in any office the length of the term of which is over two years, the vacancy shall be filled by the election of some person to the office at the first general election after such office becomes vacant." (Sess. Acts 1873, p. 43, approved March 13, 1873.) The length of this term is over two years, and the supposed vacancy occurred January 4, 1875, being more than six months before November, 1880, when the next general election for circuit judges occurs, and the next general election after January 4, 1875, is in November, 1876. Therefore, there can be no election of circuit judge to fill this supposed vacancy until November, 1876.

Neither could the governor appoint, to fill this vacancy, as the Constitution, Art. 6, sec. 14, says: "But if such vacancy shall happen within six months of the general election for circuit judges, the governor shall appoint a judge for such circuit." Thus showing that the governor can appoint only when the vacancy happens within six months of the next general election for circuit judges, and as this happens in 1880, there would thus be left no power of appointment.

It is alleged that Gale abandoned the office. But there is no allegation of an intent to abandon, and there can be no abandonment without an intention to abandon. (State vs. Pritchard, Am. Law Reg., Aug. 1873, p. 514; 7 Vroom, 101; 39 Tex. 1.)

It is further charged that Gale had commenced the practice of law in the Ninth Circuit—(the defendant at the same time claiming that the office was vacant, and there was no court to practice before.) As the law does not allow circuit judges to practice, this is simply a charge of malfeasance or misfeasance in office.

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Lay & Belch, with John W. Booth, for Respondent.

I. The allegation of abandonment by Gale standing admitted by the demurrer, of itself shows a vacancy. The respondent, being elected and commissioned to fill that vacancy, takes possession, and continues to execute the functions of the office. Gale, the person alleged to have abandoned the office, has not come forward at any time and set up title to the office. (See *State ex rel. &c. vs. Draper*, 45 Mo. 355; *State ex rel. &c. vs. Lusk*, 48 Mo. 242.)

II. The governor, and what is the same, the people, declared there was a vacancy, and in this proceeding, where no private rights are involved, the people of the State are estopped from denying respondent's right. (*Commonwealth vs. The Pejepscut props.*, 10 Mass. 155; *Commonwealth vs. Heirs of Andre*, 3 Pick. 224; Opinion of court in response to Governor, 49 Mo. 316.)

III. But by the constitution, article 5, § 14, "the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy." Could language more plainly confer the power of determining the question, did a vacancy exist? We think not.

And the officer in whom the constitution confided the power of judging has passed judgment. Had he declined to act, no court could have compelled him to do so (*State ex rel. Bartley vs. Governor*, 39 Mo. 388), and having acted, no court can review or reverse his action. (*Martin vs. Matt*, 12 Wheat 19, see p. 31; *Vandeyheyden vs. Young*, 11 Johns. 150, see p. 157; *Commonwealth vs. Baxter*, 35 Penn. St., 263; *State vs. Adams*, 2 Stew. [Ala.] 23; *Britton vs. Stebers*, 62 Mo. 870; *State ex rel. Robinson vs. County Court of New Madrid*, 51 Mo. 82; *State ex rel. Brooks vs. Baxter*, 28 Ark. 129; *Tappan vs. Gray*, 7 Hill. 259.) At all events, every reasonable presumption is in favor of the regularity and legality of his acts. (*State ex rel. vs. Wrot Nowski*, 17 La. 156; *Bank U. S. vs. Dandridge*, 12 Wheat. 70; *State ex rel. Leal vs. Jones*, 19 Kerr. 356; *Cool. Const. Lim.* p. 69.)

IV. Gale was not *de facto* a judge. An officer *de facto*, as between the government and himself, is one who comes in office by the forms of an election or appointment. The mere performance of official duties does not constitute him such an officer. There must be color of right by election or appointment, or an acquiescence on the part of the public for such a length of time as to raise a strong presumption of colorable right. (State ex rel. Cornwall vs. Allen, 21 Ind. 516; Kerr vs. Jones, 19 Ind. 351; Ang. & Ames Corp. 465; 1 Dill. Mun. Corp. [2 ed.] § 167; State ex rel. Leal vs. Jones, 19 Ind. 356.)

V. The death of McCord caused the office of judge of the ninth judicial circuit to become vacant, under a proper and natural construction of section 14 of art. 6, of the constitution of 1865.

VI. The cases which show that the office is, under certain circumstances, filled to a special intent only, and vacant to another special intent, and that the term of office is not extended under the circumstances to one so specially permitted to remain in office, are as follows: to-wit: (Chelmsford Co. vs. Demarest, 7 Gray, 1; State vs. Hopkins, 10 Ohio St. 509; 17 Wis. s. p. 658; People vs. Langdon, 8 Cal. 1; People vs. Addison, 10 Cal. 1; People vs. Reed, 6 Cal. 288, lead cas.; Brooks vs. Melony, 15 Cal. 221; People vs. Stratton, 28 Cal. 282; State vs. Wotnowski, 17 La. Ann. 156; Riddell vs. School District, 15 Kas. 168; Wapello vs. Bingham, 10 Iowa, 39.)

(Counsel here reviewed the cases of People vs. Snedeke, 14 N. Y. 52; People vs. Fischer, 24 Wend, 215; People vs. Lord, 9 Mich. 227; Comm. vs. Hawley, 9 Pa. 513; State vs. Lusk, 18 Mo. 333; People vs. Tilton, 37 Cal. 614, and others, and contended that, properly understood, they were not adverse to respondent.)

HENRY, Judge, delivered the opinion of the court.

This is a proceeding by the State, through the attorney general, to try the right of the defendant to the office of judge of the ninth judicial circuit.

In November, 1868, D. Q. Gale and one Peter B. McCord were candidates for judge of the ninth judicial circuit. On the

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first Monday in January, 1869, Gale entered upon the discharge of the duties of the office, and continued to discharge them until the expiration of the term of office commencing on that day. In November, 1874, Peter B. McCord was duly elected to succeed Gale, received his commission from the governor, and in December, 1874, took and subscribed the oath of office. On the 2d day of January, 1875, before his term of office commenced, he departed this life. The governor issued a writ for an election to be held the 3d day of March, 1875, to fill the vacancy which, in his judgment, the death of McCord had occasioned, and respondent, at that election received a majority of the votes cast, was commissioned and qualified, and entered upon the discharge of the duties of the office.

These are the facts which appear of record, and about which there is no controversy. The relator in his information alleges that said Gale, for his first term, was duly elected, commissioned and qualified.

The respondent in his answer denies that Gale was elected or commissioned, or that he took the oath of office; and alleges that he was an intruder and a usurper, and that his usurpation commenced on the first Monday of January, 1869, and continued to the first Monday of January, 1875; admits that there was an election in November, 1868, and that Gale and McCord were candidates, but alleges that McCord was then duly elected. He also charges in his answer, that at the date of the writ of election, "a vacancy in fact existed and that said Gale did not in fact perform nor claim to perform, nor assume to perform, nor claim the right to perform the duties of said office; but on the contrary had wholly given up and abandoned said office, and had engaged in the practice of law, as an attorney-at-law, in the several circuit courts of the said ninth judicial district.

To respondent's answer the relator filed a demurrer, and respondent contends that by the demurrer it is admitted that Gale usurped, and also that at the date of the writ of election he had abandoned the office.

The facts alleged and relied upon in support of the allegation, that Gale *was*, conclusively show that he was not, a usurper.

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Those facts are, as alleged by defendant, that he entered upon the discharge of the duties of the office on the first Monday in January, 1869, without having been duly elected, commissioned or qualified, and for six years—the entire term—was the acting judge of that judicial circuit. An acquiescence for such a length of time in his claim to be judge of the circuit, and in his acting as such, by the people of that circuit, the attorney general and his competitor, McCord, made him a judge *de facto*, and precludes us in this case from declaring that he was an intruder and a usurper.

With regard to the averment that Gale had abandoned the office, without determining whether there can be an abandonment of an office in this State, otherwise than by resignation, removal, or some other act which the statutes may provide shall vacate an office, we are satisfied that more particularity is required in pleading abandonment than has been observed by the respondent in this case. A circuit judge cannot abandon his office by saying he abandons it, or merely by neglecting to attend to his duties as judge. What amounts to an abandonment of an office (if one can be vacated by abandonment, otherwise than in the manner prescribed by the statute), is a question of law, and the special facts should be stated, in order that the court may determine whether those facts constitute an abandonment or not.

In immediate connection with the averment of abandonment, it is alleged that "Gale engaged in the practice of his profession" in the counties composing the ninth judicial circuit. If this be stated as the fact relied upon by respondent to show an abandonment it is not sufficient. A circuit judge may practice law, and while by so doing he violates the law and subjects himself to indictment and impeachment, he does not vacate or abandon his office any more than any other conduct, violative of his oath "faithfully to demean himself in his office," would vacate or amount to an abandonment of his office.

It is insisted by respondent that this court cannot review the action of the governor in issuing a writ for a special election to fill a vacancy in office which he may determine has occurred, and

he bases his denial of the jurisdiction of the court on the 14th section of the 5th article of the Constitution of 1865, which provides that "the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy."

The division of the powers of the government into three distinct departments, each to be confided to a separate magistracy, is to be found in the State constitution of every State in the Union, and in nearly, if not all of them, power is given the governor to fill vacancies which occur in office.

The power to fill a vacancy implies the right of the officer to whom it is given to determine when a vacancy exists, if the right to determine that question is not bestowed elsewhere, and the 14th section confers no greater authority upon the governor in this respect than is given him in the power conferred to fill a vacancy.

If the power to fill a vacancy did not carry with it authority to determine when a vacancy exists, and that authority is not given to some person or tribunal, a vacancy could not be filled, and the section would be nugatory. Hence, that provision of the constitution that "the governor, upon being satisfied that a vacancy exists, shall issue a writ of election, etc.," confers no judicial authority, but merely for convenience authorizes him to determine that question, because the public service might suffer if a vacancy could not be filled until after a judicial investigation be had. He determines it upon *ex parte* testimony or information that is not technically testimony at all, and surely it was not intended that the rights of incumbents were to be conclusively determined by the governor, by the discharge of the duty imposed upon him by that section.

Nearly every authority cited in the briefs filed by the attorneys in this case, was one in which, on the relation of some officer or citizen, the act of a governor in filling a vacancy was reviewed by the court, and in nearly all of the State constitutions the provision conferring power upon the governor to fill a vacancy is substantially the same as that in our State constitution.

In many of those cases it was determined that the acts of the governors were illegal, and by the judgments of the courts their

appointees were ousted. The case of the State vs. Lusk (18 Mo. 333) was a case in which the jurisdiction of the court denied here was exercised. The doctrine contended for by respondent would prostrate the other departments of the Government, and make the chief executive supreme over them. He would have but to declare a vacancy in every judicial circuit in the State to remove all the incumbents, and supply their places with men of his own choice. The doctrine so strenuously contended for by respondent is equally in conflict with reason and authority.

Having disposed of these preliminary questions, we come now to the main question in this case: Was there a vacancy in the office of judge of the ninth judicial district on the first Monday in January, 1875? If there was, the demurrer must be overruled and judgment rendered for defendant.

In November, 1874, McCord was elected. In December following he received his commission, and took and subscribed the prescribed oath of office, and on the 2d day of January, two days before the term for which he was elected commenced, he departed this life. The Constitution of 1865, art. 6, § 14, provides that the circuit judges "shall be elected for the term of six years, but may continue in office until their successors shall be elected and qualified." The same section also provides that "if any vacancy shall happen in the office of any circuit judge by death, resignation, removal out of his circuit, or by any disqualification, the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy."

We are referred to the case of the State vs. Lusk (*supra*) as an authority in support of the position that the death of McCord before his term commenced created no vacancy. On the 24th day of March, 1845, the General Assembly passed an act establishing the office of public printer, and provided that "a public printer shall be elected at the present session of the General Assembly, and at every regular session thereafter, by joint vote of the two houses;" that he should hold his office for "two years, commencing on the first of May next thereafter, and until his successor shall be elected and qualified; and that public printers thereafter elected shall hold office for two years, and

until their successors shall be elected and qualified." The 6th section provided that "if the public printer should die or resign, or if from any other cause the office should become vacant, the governor shall appoint a public printer, who shall give bond and qualify, and shall hold his office for the same time that the printer in whose stead he shall be appointed would have held."

On the 4th day of February, 1851, James Lusk was duly elected public printer, and thereupon gave bond and qualified. The general assembly, which convened in December, 1852, failed to elect a successor, and in May, 1853, the governor appointed John G. Treadway. It was insisted that the failure of the general assembly to elect created a vacancy which the governor could fill by appointment, but this court in that case held otherwise.

In the case at bar there was an election. The successful candidate, McCord, received his commission and took the oath of office. The limit of Gale's term of office fixed by the constitution was six years from the first Monday in January, 1869, if a successor should be duly elected and qualified. His successor was duly elected and qualified. There was no one elected by the General Assembly to succeed Lusk, and this makes a material and vital difference between the two cases, and without overruling that, we may, in this case, determine that there was a vacancy created by the death of McCord.

The case of the Commonwealth vs. Hanley (9 Barr, 513) is in many of its features similar to this, and is confidently relied upon by relator. Hanley was elected clerk of the orphan's court on the second Tuesday in October, 1845, for three years from the first day of December, 1845, "and until a successor should be duly qualified." He qualified and entered upon the discharge of the duties of the office. On the second Tuesday in October, 1848, one Brooks was elected to succeed Hanley, but died on the 7th day of November following, within thirty days from the day of election, and by the law of that State he could not have qualified to fill the office by taking the necessary oath, or by giving bond within thirty days from the day of election.

The opinion of the court was delivered by Rogers, J., and we quote from that opinion so much as we think bears upon the questions discussed in this case. "Was there a successor duly quali-

fied within the spirit of the Constitution? is the point on which the question mainly if not entirely depends. Being duly qualified in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that the successor shall possess every qualification; that he shall in all respects comply with every requisite, before entering on the duties of the office; that in addition to being elected by the qualified electors he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the constitution of the commonwealth, and to perform the duties of the office with fidelity. Until all these pre-requisites are complied with by his successor (for if you can dispense with one you can dispense with all) the respondent is *de jure* as well as *de facto* the clerk of the orphan's court."

The words are emphatic and full of meaning. The successor must not only be qualified, but duly qualified; and qualification for office, as defined by the most approved lexicographer, is "endowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose."

If McCord had died after his election and before he received his commission and qualified, Commonwealth vs. Hanley would be an authority direct to the point that his death created no vacancy, and we infer from the opinion of the court, that if in that case Brooks had duly qualified and died before the commencement of the term for which he was elected, the court would have held that his death created a vacancy. Here it is admitted that McCord was duly elected and commissioned, took and subscribed the prescribed oath, was thirty years of age, learned in the law, and resident in the ninth judicial circuit, and was therefore, at his death "duly qualified," as those words are expounded by the learned judge in Commonwealth vs. Hanley.

By the law of Pennsylvania, Brooks was not permitted to give his official bond or take the oath of office within thirty days after his election, but by § 2, art. 1, ch. 4, Wagn. Stat., it is provided that "each judge or justice shall, within thirty days after the receipt of his commission, and before entering upon the du-

ties of his office, take the oath of loyalty prescribed by the Constitution of the State, and that he will faithfully demean himself in office." So that taking of the oath of office by McCord was not premature, but was taken in compliance with the law.

There is such a conflict between the California cases which have been cited, that they are of but little authority on either side of the question. The earlier cases sustain defendant's view. They are, however overruled, in two cases more recently decided, but by a divided court, the dissenting judges adhering to the doctrine of the former cases.

We have been referred to cases in New York and elsewhere, in which are observations to the effect that an office cannot be considered vacant while there is an incumbent legally in office, and discharging the duties of the office, but this we do not controvert, and it only brings us back to the question, was there an incumbent of the office of judge of the ninth judicial circuit when the governor issued his writ of election? If there was, there was no vacancy, and those cases would be in point; but the very question we are discussing is, whether there was then an incumbent, and this turns on the meaning of the word *qualified*, as used in our constitution of 1865.

The case of the State vs. Hopkins (10 Ohio, 509) is so like the case we are considering in its facts, and so directly sustains the position of the respondent on the main question in this case, that we feel inclined to state fully the facts of the case, and the opinion of the court so far as it bears upon that question. By the statute of that State the county commissioners were expressly authorized by statute to appoint a county treasurer, whenever that office became vacant "by death, resignation, removal, neglect to give bond, or from any other cause." At the fall election of 1857 one Hopkins was re-elected county treasurer, and on the first Monday of June, 1858, having been duly qualified, entered upon his second term of office. At the regular election in the fall of 1859, Matthias Rapp was duly elected to succeed Hopkins. Afterwards, in 1859, the governor issued to said Rapp a commission as county treasurer, which was transmitted to the county clerk. On the 27th day of November, 1859, before the com-

mencement of his term, said Rapp deceased, having never, in fact, received his commission. On the first Monday of September, 1860, the day on which the term for which Rapp was elected commenced, the county commissioners appointed William Adams to fill the vacancy occasioned by the death of Rapp. Adams qualified and Hopkins refused to yield possession of the office.

The principal question in that case, as in this, was, whether the death of the officer elect, before his term of office commenced, occasioned a vacancy. The court in that case says: "By reason of the death of Matthias Rapp, prior to the commencement of the term for which he had been elected, there was no person, on the first Monday of September, 1860, entitled to take and hold the office during the regular statutory term commencing on that day. And this want of a regular incumbent for the term occasioned by the death of a party who would otherwise have been such, constitutes, as we think, a vacancy occasioned by death, within the meaning of the statute. And were it necessary, we should hold that under the statute last cited, the office became vacant upon the failure of Rapp to give bond and take the oath of office. True, this failure was caused by the act of God, and not by the laches of the party, but its effect upon the office is the same, whatever may have been the cause.

"This construction makes the legislative intention accord with the constitutional policy, by which no person is 'eligible to the office of county treasurer for more than four in any period of six years.'"

The last paragraph of the opinion we quote, because it is urged that the court was controlled by this constitutional provision in its conclusion that there was a vacancy. The court, on the contrary, says with emphasis, that the vacancy was occasioned by death, and there is no intimation in the opinion that the constitutional provision, which is only incidentally referred to, in any manner influenced the conclusion which the court arrived at in that case.

If the death of Rapp occasioned a vacancy in that, no one would contend that McCord's death did not occasion a vacancy in this case. Rapp had not received his commission, had not

given his official bond, had not taken the oath of office, had done nothing but announce himself a candidate, and received a majority of the votes cast, while McCord had done all that was required of him by the law, and within the time prescribed by the statute.

The *People vs. Lord* (9 Mich. 227) is another relied upon by relator, as expounding the meaning of the word *qualification*, in favor of the view taken by him.

The Constitution of Michigan, under which that case was determined, provides "that a judge of probate shall hold his office for four years, and until his successor is elected and qualified." In 1860, North, then in office, was re-elected of his own successor, for the term commencing January 1, 1861. He died November 22, 1860. Van Valkenburg was appointed by the governor to fill the vacancy, which in his judgment had occurred. On the first of January, 1861, under the impression that the time for which the first appointee, Van Valkenburg, was appointed, ended at the expiry of North's first term, the governor appointed Henry Lord for the next term. It will be observed that North died in November, 1860, before the commencement of his second term. It does not appear that after his election he was otherwise qualified under the law of that State.

The case presents the same material difference from this case that we have noticed as distinguishing the case of the *State vs. Hopkins* (10 Ohio, 509) and the *Commonwealth vs. Hanley* (9 Barr, 517), from the case at bar.

In the opinion of the court in *The People vs. Lord*, the court says: "His (Van Valkenburg's) term of office did not expire on the 1st of January, 1861, unless some one elected and qualified was then ready to take the office." We submit that the language of the court extends the term beyond the time fixed by the express words of the Constitution of Pennsylvania. The constitutional limit was, "until a successor is elected and qualified," but the court adds, "and ready to take the office." The construction of the word *qualified* was not directly before the court. There had not been an election, and that, under the law of Michigan, was decisive of the question. There was no question about the quali-

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fication or what amounted to qualification of one elected, for no one had been elected. We cannot, therefore regard it as a direct authority on the question, but if it were, we think that the weight of authority is against it. The law abhors vacancies in public offices, and great precautions are taken to guard against their occurrence. The policy of the law is to have some one always in place to discharge the duties of public offices, and in a doubtful case the construction of a law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a *casus omissus* resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence.

By the term of the Constitution, Gale's term was to cease when a successor should be elected and qualified. His successor, McCord, was duly elected and duly qualified, and when that occurred Gale's right to hold over ceased, and the death of that successor, before his term commenced, did not revive a right in Gale which ceased when McCord qualified.

With the concurrence of the other judges, the demurrer is overruled, and judgment for respondent, Seay.

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H. N. ESS, Respondent, vs. MARY J. BOUTON, et al., Appellants.

1. *Special tax bills, evidence of contract with city, when—Evidence—Prima facie case made out by bill—Evidence contra will not be reviewed, when.*—Under a municipal charter which provides that a special tax bill shall "in any action brought thereon be *prima facie* evidence that the work and material charged in such bill have been furnished, and of the liability of the parties therein named as the owner of the property," the bill itself furnishes presumptive evidence of the existence of the contract under which the work was done. Such bill being put in evidence furnishes a *prima facie* case, and no declaration of law being given, the Supreme Court will not review the opposing evidence for the purpose of determining whether it be sufficient to overthrow the case so made out.

Appeal from Jackson Co. Special Law and Equity Court.

Ess v. Bouton, et al.

Geo. A. & A. T. Black, for Appellants.

NORTON, Judge, delivered the opinion of the court.

This suit is for the recovery of a special tax bill for making side-walk on part of Third Street in Kansas City, which was issued to the contractors and by them assigned to plaintiff. The suit was instituted against defendants as owners of lot No. 294, block 31, and its object is to subject said lot to the payment of said tax bill.

The case was tried before a justice of the peace and judgment rendered for plaintiff, from which an appeal was taken to the Special Law and Equity Court of Jackson County and on a trial *de novo* in said court, judgment was again rendered for plaintiff.

The case was tried by the court without the intervention of a jury, no declarations of law were asked and none were given, and the only exception saved, as shown by the record, was as to the action of the court in admitting the tax bill as evidence. Defendants objected to its introduction on the ground that plaintiff should first prove the existence of a contract under which the work was done, for which the tax bill was issued.

Section four of an act to revise and amend the charter of the City of Kansas (Acts 1870, p. 347) provides that such tax bill shall "in any action brought thereon, be *prima facie* evidence that the work and material charged in such bill have been furnished, and of the liability of the persons therein named as the owners of such property."

Under this provision, the objection of defendant was properly overruled.

It is urged that the judgment is against the evidence. A number of the ordinances of the city were offered in evidence without objection, and this court will not look into the evidence for the purpose of weighing it and ascertaining whether it preponderated on the side of plaintiff or defendant.

A *prima facie* case was made when the tax bill was received in evidence and no declarations of law having been given, the evi-

State v. Sutton.

dence will not be reviewed here for the purpose of determining its sufficiency to overthrow the case made by plaintiff.

Judgment affirmed, in which the other judges concur.

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STATE OF MISSOURI, Respondent, *vs.* R. P. SUTTON, Appellant.

1. *Indictment—Same offense charged in different counts—Prosecutor not compelled to elect, when.*—Where the several counts of an indictment refer to the same transaction and are intended to charge only a single offense, but are differently framed in order to meet the evidence as it may be developed at the trial, as where the accusation is for stealing sundry caddies of tobacco from a certain railroad depot, and also for receiving the same, knowing them to have been stolen from the depot, the prosecutor should not be compelled to elect on which count he will proceed.
2. *Common Pleas Court of Sugartree township, Randolph county—Jurisdiction over offense committed before its establishment.*—A Common Pleas Court, having been established for the township of Sugartree in the county of Randolph, in lieu of the circuit court of the county, "with exclusive original jurisdiction in all criminal actions," was authorized to try an offense committed before the act creating it took effect, where the circuit court had not theretofore acquired special jurisdiction of the case, by proceedings instituted therein.
3. *Indictment—Receipt—Hearsay, when.*—On indictment charging the stealing of property from a railroad company, a paper given by the consignee acknowledging the receipt of money in payment of the goods, is not competent to prove the loss of the goods. It is hearsay.
4. *Instructions, multiplicity of—Giving of others by court in lieu of.*—Where instructions are very numerous, the court may properly refuse them all, and present the case to the jury in a few clear and pointed ones of its own.

Appeal from Randolph Circuit Court.

H. S. Priest, for Appellant, cited: *City of Moberly vs. Ferguson Co.*, 62 Mo. 77; *State vs. Hollenscheit*, 61 Mo. 302; *Comm. vs. Hudson*, 11 Gray, 65; *Knaup vs. Piqua Bank*, 1 Ohio, St. 603; *Lessee of Mitchell vs. Eystee*, 30 Wis. 384; *Ashlock vs. Commonwealth*, 7 B. Mon. 44; 38 Mo. 402; 21 N. Y. Eq. 424.

J. L. Smith, Att'y Gen'l, for Respondent, cited: *Sess. Acts* 1875, p. 402, § 2; *State vs. Porter*, 26 Mo. 201; *State vs. Pitts*, 58 Mo. 557.

HENRY, Judge, delivered the opinion of the court.

At an adjourned term of the Moberly Court of Common Pleas a grand jury returned an indictment against defendant containing two counts ; the first for larceny, charging defendant with having stolen four caddies of tobacco from the St. L., K. C. & N. R. R. Co.'s depot at Moberly, the property of Thomas, Mason & Florissell. The second count charged defendant with having received four caddies of tobacco from Frank Carr, knowing that said Carr had stolen them from the possession of the St. L., K. C. & N. R. R. Co., and that they were the property of Mason & Florissell.

Defendant filed his motion to require the State to elect on which count of the indictment it would go to trial, which motion was by the court overruled ; and this, it is urged, was error.

In the case of the State vs. Porter (26 Mo. 201) the court held that "if the several counts referred to different transactions, in point of fact, it is a matter of discretion with the court to compel the prosecutor to elect upon which count he will proceed, and the power ought to be exercised in cases where the offenses are distinct and of a different nature, and calculated to confound the defense. Where the offenses are of the same character, differing only in degree, as for example forging a note and publishing it knowing it to be false, the defendant may be tried upon both charges under the same indictment. It is usual to frame several counts where only a single offense is intended to be charged, for the purpose of meeting the evidence as it may transpire at the trial ; and in such cases the court will not compel the prosecutor to elect."

In the case at bar the several counts refer to the same transaction in point of fact, and only a single offense was intended to be charged. The two counts were resorted to to meet the evidence as it might transpire on the trial. The party could not have been convicted of both stealing the tobacco and receiving it, knowing it to have been stolen. If guilty under the first, he could not have been convicted under the second count, and *vice versa*. The court did not err in overruling the motion.

It is insisted that the Moberly Court of Common Pleas had no jurisdiction of the cause ; that the offense, if at all, was committed in Sugartree township, in Randolph county, before the passage of the act establishing the Moberly Court of Common Pleas ; that said act was prospective in its operation and did not take from the Randolph Circuit Court jurisdiction of the cause.

The Court of Common Pleas was established for the township of Sugartree, in the county of Randolph, and the fourth section of the act conferred upon it, within the limits of Sugartree township, " exclusive original jurisdiction in all civil actions, both in law and equity, in all actions involving sums not exceeding fifty thousand dollars, to the same extent as circuit courts have, and concurrent jurisdiction with justices of the peace to the same extent as circuit courts ; and said court shall also have and exercise, within the limits aforesaid, exclusive original jurisdiction in all criminal actions as are had and exercised by the circuit courts of the State." (Sess. Acts, 1875, p. 401.)

If a new county had been formed by taking a portion of the territory of Randolph county and thrown into another judicial circuit, would it be contended that, for an offense committed in such territory before the act creating the new county, the party would be indictable only in Randolph county? Or that he could be indicted in Randolph county at all? If the views of defendant's counsel are to prevail, then no civil action, where the cause of action accrued in Sugartree township before the act establishing the Court of Common Pleas was enacted, could be commenced in that court because the jurisdiction of the circuit court of Randolph County at the date of the passage of the act had attached, as the counsel states it.

There is but one case cited by appellant that bears upon this question. (Ashlock vs. Commonwealth, 8 B. Mon. 44.)

An act was passed by the legislature of Kentucky, conferring upon the city council of Lexington exclusive jurisdiction of all pleas of the commonwealth, arising within the limits of that city, except cases of felony.

When the act was passed, the State vs. Ashlock was pending in the Fayette circuit court, which had jurisdiction to hear and

determine it. Defendant was convicted and appealed to the court of appeal. Judge Buck held that "as no provision was made in the act for the removal of cases of this kind, then pending in the Fayette circuit court, we are not authorized to presume that it was the intention of the Legislature to deprive the court of jurisdiction. The exclusive jurisdiction conferred upon the city court must, we think, have reference to cases arising subsequent to the passage of the act, or to cases or proceedings subsequently to be commenced or instituted." In that case the jurisdiction of the circuit court had attached. Proceedings had been commenced in that court, and there was nothing in the act conferring jurisdiction upon the city court to authorize a presumption that the legislature intended that proceedings commenced in such cases in the circuit should cease.

There is nothing in the case to sustain the views of the defendant, except the remark of the judge who delivered the opinion, "that the exclusive jurisdiction conferred upon the city court must have reference to cases arising subsequent to the passage of the act, or to cases or proceedings subsequently to be commenced or instituted." It was very clearly one or the other, and the court does not determine that it has reference to cases arising subsequently to the passage of the act, but only that it has reference either to that class of cases, "or to cases or proceedings subsequently to be commenced or instituted."

It is to the latter class of cases in our judgment that the second section of the act establishing the Moberly Court of Common Pleas has reference, and it does not depend upon the time when the offense was committed in Sugartree township whether that court has jurisdiction or not. If the offense was committed before the passage of the act establishing that court, and the Randolph Circuit Court had not acquired special jurisdiction of the case by proceedings instituted therein before the act took effect, then the Moberly Court has exclusive jurisdiction of the case.

On the trial of the cause, the State against the objection of the defendant was permitted to read in evidence a receipt signed by Mason & Florissell, as follows:

"Received, Foristelle, Mo., March 30, 1875, of St. Louis, Kansas City and Northern Railway Company, the sum of fifty-eight dollars in full for loss of four caddies tobacco.

Dec. 5, '72.

Mason & Florissell."

A voucher was also introduced; but in regard to this voucher the record is so illegible by reason of erasures, interlineations and bad penmanship that we have been unable to decipher it, and are compelled to pass by the objections made to it.

The receipt read in evidence should have been excluded. In substance it is not a written declaration of competent witnesses, that they had lost four caddies of tobacco and that the railroad company had made good their loss. If it was important to prove the loss of the four caddies by Mason and Florissell—and it certainly was—then it was not competent to prove that fact by hearsay evidence. (2 Greenl. 148.) As, for this error the judgment must be reversed, it is unnecessary to notice particularly the instructions. They are generally correct, and fairly present the law of the case. The principal objection to instructions was that they did not state to which count they were applicable, but as the defendant can be tried again only on the second count, having been virtually acquitted of the charge in the first count, no further consideration of the instructions in that regard is necessary. The instructions are numerous, and we desire once more to suggest, that the practice of asking and giving so many instructions in a case, is calculated to confuse rather than guide a jury to a correct conclusion; and it would be well, if attorneys will persist in the practice, for the court to refuse all they ask and in a few clear and pointed instructions present the law of the case to the jury.

Judgment reversed and remanded. The other judges concur.

Proctor v. Hann. & St. Joe. R. R. Co.

EMMA F. PROCTOR, Respondent, vs. HANN. & ST. JOE. R. R. Co.,
Appellant.

PER CURIAM.

1. *Statute, construction of—Particular words and passages, how construed.*—Where particular words or clauses of a statute are of doubtful import, they should be construed in connection with the entire statute, and if their literal construction would lead to a conflict in the statute, or to absurd conclusions, they should be restricted or enlarged so as to render the statute harmonious and sensible.
2. *Damage act—Death caused by negligence of co-employee—Selection of, care of company in reference to—Section 2, of Damage Act, merely transmits cause of action.*—The master cannot be held for injuries received by one servant through the negligence and unskillfulness of his fellow servant, unless in the selection of the latter the master fails in care and diligence, or retains him after knowledge of his character; and § 2 of the Damage Act, properly construed in its context, gives the representative of a deceased railroad employe no right of action against the company for death caused by the negligence and unskillfulness of a co-employe, except where his selection or retention is attributable to the want of care in the company.

The phrase "any person," as used in that section, does not include fellow servants.

The right designed to be conferred by § 2 is analogous to that given by § 3, and not an original one created after the death of the employe, but a right which the deceased might have exercised, had he survived, and which is transmitted to his representative. Nor is any new right of action given by the latter clause of section 2, to the representatives of a deceased passenger against an owner of the road as contra-distinguished from the corporation having charge of it. The term "owner" is therein used in the sense of proprietor or operator at the time of the accident. The above construction is aided by the following considerations: a. Were the interpretation different, the deceased might recover for his injuries independently of the statute, if he survived long enough, and after his death recovery might again be had under § 2, for the same casualty. b. Under the first clause of the section, in case of death from the negligence of the co-employe, a right is given the representative after the decease, which had no existence before. c. And under the 2d clause, in case of death resulting from defective appliances, the representative is denied a right which the deceased might have exercised, had he survived. (Schrultz vs. Pac. R. R., 30 Mo. 13, overruled.)

PER HENRY, J., DISSENTING.

1. *Railroad Damage Act, construction of—Sections 2 and 3 compared—Section 2, road liable in case of death of employe, etc., regardless of care in selecting co-employe—Representative of passenger—Action against "owner"—Meaning of word—Section punitive—Section 3, contrawise.*—Sections two and three of the Damage Act, in regard to their intents and purposes, differ in several important particulars.

Proctor v. Hann. & St. Joe. R. R. Co.

Section 2 is in derogation of the common law.

(a.) It gives the representatives of the servant killed by the negligence of the fellow servant, an action against the master, regardless of the care bestowed by the latter in the selection or retention of the fellow workman. Such right is not a transmitted one, for the servant himself could not have sued under that section. (b.) It gives the representative of the deceased passenger an action against the owner, whether operating the road or not. The word "owner" is not restricted in that section to the operator.

It is penal in its phraseology (sic. making the road "pay a forfeit" and in its designation of the sum to be assessed inflexibly fixed at \$5,000 regardless of the losses entailed on the family of the servant by his death).

Section 3 was designed merely to prevent the abatement of a common law cause of action by death. It gives the representatives of the deceased an action against the operator of the road, but not against the owner not so operating it. It is not penal but compensatory in its terms, the amount recoverable being "damages" such as may be "fair and reasonable, not exceeding \$5,000."

2. *Railroad Damage Act—Section 2, servant—Right of representatives to sue in case of defective machinery not taken away by.*—The latter clause of section 2 does not take from the representative of the servant his right of action against the master at common law, for defective machinery.

3. *Railroad Damage Act—"Person," meaning of term.*—The term "any person," used in section 2, includes servants as well as passengers.

Appeal from Sullivan County Circuit Court.

James Carr, for Appellant.

It is a well established principle of the common law, that the master is not liable to an employee for an injury produced by the negligence of a co-employee employed generally in the same business, provided the master has not been guilty of negligence in employing such negligent servant, or in retaining such servant after notice of his incompetency. (*Priestley vs. Fowler*, 3 M. & W. 1; *Hutchinson vs. The York, Newcastle & Berwick Railway Co.*, 5 Excheq. R. 343; *Wigmore vs. Jay*, Id. 354; *Skip vs. Eastern Counties Railway Co.*, 24 Eng. L. & Eq. R. 396; *S. C.* 9 Excheq. R. 223; *Degg vs. Midland Railway Co.*, 1 Hurl. & N. 773; *Tarrant vs. Webb*, 37 Eng. L. & Eq. R. 281; *Mellers vs. Shaw*, 7 Jur. N. S. 845; *Seymour vs. Maddox*, 16 Q. B. 326; *Ormond vs. Holland*, 1 El., Bl. & Ellis, 102; *Morgan vs. Vale of Neath Railway Co.*, 5 Best. & S., 570; *L. R.* 1 Q. B. 149; *Feltham vs. England*, L. R., 2 Q. B. 33; *Wiggot vs.*

Fox, 36 Eng. L. & Eq. R. 486; Searle vs. Lindsay, 11 C. B. N. S. 429; Hall vs. Johnson, 3 H. & C. 589, 34 L. J. Exch. Ch., decided in 1865; Murray vs. South Carolina Railroad Co., 1 McMullen, 385; Farwell vs. Boston & Worcester Railroad Corporation, 4 Met. 49; Gillshannon vs. Stony Brook Railroad Co., 10 Cush. 228; Gilman vs. Eastern R. R. Co., 10 Allen, 233; Coombs vs. New Bedford Cord Co., 102 Mass. 572; Carle vs. Bangor, &c. R. R. Co., 48 Me. 291; McMahon vs. Davidson 12 Minn. 357; Michigan &c. R. R. Co. vs. Seaberry, 10 Mich. 193; Davis vs. Detroit &c. R. R. Co., 20 Id. 105; Wonder vs. B. & O. R. R. Co., 32 Md. 410; Ponton vs. Wilmington, &c. R. R. Co., 6 Jones, N. C. 245; Fifield vs. R. R. Co., 42 N. H. 240; Brown vs. Maxwell, 6 Hill. 592; Coon vs. Syracuse, &c. R. R. Co., 5 N. Y. 432; Russell vs. Hudson River R. R. Co., 17 Id. 134; Wright vs. N. Y. Central R. R. Co., 25 Id. 572; Sherman vs. Rochester R. R. Co., 17 Id. 153; Lanning vs. N. Y. Central R. R. Co., 49 Id. 528; Ryan vs. Cumberland Valley R. R. Co., 23 Penn. St. 384; Frazier vs. Penn. R. R. Co., 23 Id. 104; Weger vs. Penn. R. R. Co., 55 Id. 460; Ardesco Coal Oil Co. vs. Gibson, 63 Id. 150; Fox vs. Sandford, 4 Sneed. 36; Noyes vs. Smith, 28 Vt. 59; Hart vs. Vermont R. R. Co., 34 Id. 473; Hawley vs. Baltimore & Ohio, R. R. Co. 6 Am. Law. Reg. 352; Chamberlain vs. Milwaukee, &c. R. R. Co., 7 Wis. 425; Mosely vs. Chamberlain, 18 Id. 700; Hubgh vs. N. O., & C. R. R. Co., 6 La. Ann. 495; Union Pacific R. R. Co. vs. Young, 8 Kas. 658; Sullivan vs. Mississippi & M. R. Co. 11 Iowa, 421; Burke vs. Norwich & Nor. R. R. Co., 5 Conn. 474; Hallman vs. Henley, 6 Cal. 209; Yeomans vs. C. S. Nav. Co., 44 Id. 71; Mobile, &c. R. R. Co. vs. Thomas, 42 Ala. 672; Chicago & N. W. R. R. Co. vs. Swett, 45 Ill. 197; Illinois Central R. R. Co. vs. Sewell, 46 Id. 99; Chicago & Alton R. R. Co. vs. Murphy, 53 Id. 339; Horner vs. Illinois Central Railroad Co., 15 Id. 550; Madison & Indianapolis R. R. Co. vs. Bacon, 6 Port. 205; Ind. R. R. Co. vs. Lane, 10 Ind. 554; C. & I. R. R. Co. vs. Klein, 11 Id. 38; Ohio & Mississippi R. R. Co. vs. Tindall, 13 Id. 367; Same vs. Hammersly, 28 Id. 28; Wilson vs. Madison, &c. R. R. Co., 18 Id. 226;

Col. & Ind. R. R. Co. vs. Arnold, 31 Id. 174 ; Pittsburgh, &c. R. R. Co. vs. Ruby, 38 Id. 294 ; McDermott vs. Pacific R. R. Co., 30 Mo. 115 ; Higgins vs. Hannibal & St. Joseph R. R. Co., 36 Id. 418 ; Robback vs. Pacific R. R. Co., 43 Id. 192 ; Harper vs. Ind. & St. Louis R. R. Co., 47 Id. 567 ; DeWitt vs. Pacific R. R. Co., 50 Id. 302 ; Moss vs. Same, 49 Id. 167 ; Brothers vs. Carter, 52 Id. 372 ; Shearm & Redf. Negl. [3 ed.] 113 ; Whart. Negl. 224 ; 1 Redf. Railw. 520 ; 1 Cooley Black. Com. 432 ; Broom Leg. Max. [6 Am. ed.] 629, 630 ; 2 Hill. Torts, 470, 471 ; 5 Best & S. 570 ; 33 L. J. Q. B. 260 ; affirmed in the Exchequer, Ch. L. R. 1 Q. B. 145 ; 35 L. J. Q. B. 23.)

The common law is not changed by this act, only to give a remedy to the representative of the party killed, where he would have a right of action if he had not been killed. If Proctor had had both legs cut off by this collision : had been internally injured, so much so that he would have been compelled to occupy his couch the remainder of his life, and he had suffered the excruciating pains and agonies of a thousand deaths, and his wife had been compelled to feed, clothe and care for him, still he could not have recovered a dollar. Is this statute to be construed as giving an action to the widow, when her husband would have had none if he had survived the accident ? That would be strange construction indeed ! As to the construction elsewhere of the expression "any person," see Bent vs. St. Vrain, 30 Mo. 268 ; 1 Pow. Dén. 140 ; Dyer, 354 ; Osgood vs. Breed, 12 Mass. 528-30 ; Wilbur vs. Crane, 13 Pick. 289, 90 ; Reed vs. Davis, 8 Pick. 513.

The decision of this court in the case of Schultz vs. Pacific Railroad Company (36 Mo. 13) is not in line either with authority, with the true intent and meaning of the law makers—or with sound policy. The principle therein enunciated was impliedly overruled in the case of Higgins vs. The Hannibal & St. Joseph Railroad Company (36 Mo. 418).

Huston & Banning, for Respondent.

The court did not err in giving instructions on the part of respondent, nor in refusing instructions asked by appellant. The petition is founded entirely on the statute. (Wagn. Stat. ch. 43, § 2.) The language of the statute is plain and easily understood. The term "any person" includes employees, or else the English language must be tortured into a denial of its plain import. If employees are within the words, they are within the intention of the statute, unless they are restrained or limited. That general words of a statute are to receive a general construction, see 6 Shepley, 308 ; 6 Ad. & El. —. When the construction of a statute follows the words, it should not be overturned on, at least, doubtful evidence of intention. (Wannel vs. Smith, 15 Ohio, 134 ; Kenny vs. Greer, 13 Ill. 432.) The construction placed upon the section has become a part of it. (3 Pick. [Mass.] 567.) This whole question has been ably considered by this court, and the statute has received this construction. (Schultz vs. Pacific Railroad Company, 36 Mo. 13.)

The case of Rohback vs. The Pacific Railroad Company (43 Mo. 187) was brought by the servant himself, and the court held that the action could not be maintained by the servant himself. The case of Schultz was cited approvingly in the opinion. The court, referring to that case, says : "That case was brought by the widow of a deceased husband, under the 2d section of the act for the better security of life and property. There the statute gives the action in plain and unmistakable terms, and abrogates and modifies the common law." (43 Mo. 194 ; Brownell's case, 47 Mo. 243 ; Connor vs. Ch. & C. R. R. 59 Mo. 285.)

This statute has been in force twenty-two years. There have been ten sessions of the legislature since the section was construed in Schultz vs. P. R. Co., and no attempt has been made to amend section 2, so as to avoid the consequences of the construction placed upon it.

NORTON, Judge, delivered the opinion of the court.

This is an action instituted by plaintiff as the wife of Joseph Proctor, for the recovery of five thousand dollars damages, under the provisions of Wagn. Stat., 519, § 2.

The petition alleges that Joseph Proctor, who was the husband of plaintiff, was, on the 19th of March, 1873, in the employ of defendant as engineer, having the charge of an engine going west on defendant's road, propelling a train of cars; that on said day a locomotive engine, with a train of cars thereto attached, bound east, belonging to defendant and operated on its said road by the agents and servants of the defendant and under its management, was by said agents and servants of defendant so carelessly, negligently and unskillfully run that said eastern bound train, without any fault of said Proctor, ran into and threw from the track the locomotive in charge of said Proctor, killing him instantly; for which plaintiff, as the widow of said Proctor, asks judgment for \$5,000 damages under said section two.

There was a trial and judgment for plaintiff, according to the prayer of the petition, from which defendant appeals.

On the trial the defendant objected to the introduction of any evidence. 1. Because there is no cause of action stated in the petition; 2. Because the plaintiff seeks to recover in this cause on account of the death of her husband, Joseph Proctor, who was an employee of defendant at the time of his death, which was occasioned by the negligence or carelessness of co-employees of defendant; 3. Because the plaintiff, as the widow of an employee of defendant, is not entitled to recover on account of the death of said employee, occasioned by the negligence or carelessness of co-employees of defendant. 4. Because there is no allegation in said petition that the employees of defendant, through whose negligence or carelessness said Joseph Proctor is alleged to have been killed, were not sober, careful, skillful men, nor that defendant did not exercise due and proper care in the selection of said employees.

These objections were overruled, to which action of the court the defendant excepted.

The point presented for our determination involves the construction of Wagn. Stat., 519, § 2, especially as to whether, under the words "any person" in said section, a fellow-servant whose death is occasioned by the negligence of a fellow-servant, without fault of the master, is, or was intended to be included. The determination of this point will be decisive of this case.

Before proceeding to its consideration it may be preliminarily observed that it is well established law, both in England and this country, that a common master or employer cannot be held liable for injuries received by a servant or employee in consequence of the negligence or unskillfulness of a fellow-servant or co-employee, unless in the employment of such negligent and unskillful servant he has failed to exercise due care and diligence, or has retained him in his service after notification or knowledge of his incompetency. This rule rests for its support on reasoning which commends itself to the judgment of all, and has been dictated by the highest motives of public policy, and has been so universally sanctioned by the highest authority that a departure from it cannot be allowed unless it is made by a plain legislative warrant. Chief Justice Shaw in case of *Farwell vs. Boston and Worcester R. R. Cor.*, (4 Metc. 49,) says: "When several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others; can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common carrier will not take such precautions and employ such agents as the safety of the whole party may require. By these means the safety of each will be much more effectually secured than can be done by a resort to the common employer for indemnity, in case of loss by the negligence of each other." The liability which the rule imposes on the master if he fails to use due care in the employment of competent servants, or his failure to discharge incompetent servants after knowledge of their incompetency has been brought home to him, tends to secure the employment of those only who are skilled and competent to perform all the duties growing out of the common employment.

The freedom of the master under the rule from liability for injuries received by one servant because of the negligence of a fellow servant tends to keep in the service of the master only those who are diligent, faithful and skillful in the performance of every duty to be performed in the common employment. By its operation, the interests of both employer and employee are promoted. It has not only this scope, but if the common undertaking consists in the operation of a railroad, the safety of the traveling public is most likely to be secured by it. A principle of the law thus salutary in its effects upon all who come within the operation of it should not be relaxed or departed from, unless by clear and express legislative direction.

The construction contended for of the second section of Wagn. Stat., 519, commonly known as the Damage Act, involves a relaxation of this rule, and would be a departure from the reasoning which sustains and upholds it. If, as is conceded in this case, the deceased, if he had lived and not died from the injury, would have had no right of action against the defendant, the giving of a right of action to his wife, where none existed before, is to that extent an infringement upon the reason of the rule.

Giving to the words "any person," as used in the second section, a literal import, and not considering them in connection with the evident purpose of the legislature, nor reading the section in which they occur in connection with sections 3 and 4, the construction contended for is alone maintainable. This method, however, of construing a statute is not to be adopted. When particular words or particular clauses of a statute are of doubtful import, they should be considered in connection with the entire statute, and in such cases, when such words or clauses literally construed would produce a conflict in the act or lead to absurd conclusions, they may be restricted or enlarged in their operation so as to cause each part of it to harmonize with every other part.

It is conceded by all that the third section of the act was only designed to transmit a right of action, which but for the section would have ceased to exist, or would have died with the person; in other words, that under section three whenever a person dies

from such wrongful act of another as would have entitled the party to sue had he lived, such cause of action may be maintained by certain representatives of the deceased, notwithstanding the death of the party receiving the injury. It creates no new cause of action but simply continues or transmits the right to sue, which the party whose death is occasioned would have had, had he lived. It is not only a right transmitted, but it is restricted by limitations as to the persons who are to enjoy the right, the time within which it is to be enjoyed and the amount of damages to be recovered. Section 4 provides that all damages accruing under section 3 shall be recovered by the same parties and in the same manner as is provided in section 2, and in every such action the jury may give damages not exceeding five thousand dollars. This section, in connection with section 2, designates the parties to whom this right is transmitted, and also the time within which it is to be exercised.

It is not pretended that section 3 transmits a right of action where a fellow-servant comes to his death by negligence of a fellow-servant, when it is not shown that the master acted without due care in the employment of such fellow-servant, or retained him after he had been informed of his incompetency. Nor is it contended that under section 2 or any other section of the act the legislature has changed the common law rule as to the liability of the master to the servant himself, for an injury occasioned by the wrongful or negligent act of his fellow-servant.

The position assumed is, that under section 2, if a servant shall die from an injury resulting from or occasioned by the negligence * * * of any officer, agent, servant, whilst running, conducting or managing any locomotive, car or train of cars, his representative may sue and recover \$5,000 of the master, although such servant, had he survived the injury, no matter how serious, could not have maintained any action at all against the master.

This conclusion is reached from the language used in the act—"when any person shall die," &c. It is true that these words, in their literal signification, are comprehensive enough to include a servant or employee, and to these terms their plain and natural

import should be given, unless absurd consequences follow, and inconsistencies in the act are brought to light by such meaning.

Adopting the construction insisted upon by plaintiff, and a servant injured by a fellow-servant while operating a locomotive or train of cars, although he may be maimed, mangled and disfigured, and may suffer for an indefinite period of time the most excruciating tortures, can have no action against the master or employer; yet if he die, his representative may recover of the employer \$5,000. Under the view of plaintiff, the right to sue is not a transmitted right, but an original right, arising or appearing for the first time at the instant of the death of him or her through whom the right is derived. The very face of the second section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right. This is shown by the character of the parties authorized to sue. They must be first, either the husband or wife of the deceased; second, if there be no husband or wife, or he or she fails to sue in six months after the death, then the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother, or if either be dead, then the survivor.

It manifestly appears from these provisions—for they apply to the injuries alluded to in section 3, as well as to those in section 2—that it must have been in the mind and intention of the legislature only to confer upon the above classes of persons the right to sue in cases where the husband, wife or child could have sued, had not death been the result of the injury.

If the suit is instituted by the husband for the death of the wife, he would be required to allege and prove the fact that at the time the injury was received, occasioning the death, he was her husband, before he would be entitled to recover. This would be the initial and necessary step, in the case, for he might prove by a thousand witnesses the death and the occasion of it, yet it would avail him nothing unless the relationship of husband and wife was established. If the words "any person" in the act are to be construed as including servants, then the inconsistent if not absurd conclusion follows that although under the common law

rule the master has committed no wrong against the servant, has violated no law, and done nothing which imposes upon him a legal liability to answer in damages an action brought by the servant himself, yet upon *his* death a cause of action which never before had an existence, is at once developed and brought to light, and is lodged in the representatives of the deceased. Not only is the above conclusion involved in the construction contended for by plaintiff, but also the further conclusion that the party receiving the injury, if he lives, say one year, may himself sue and recover, for the injury inflicted upon him, damages in any amount which the jury trying the case may give under the facts of the case, and if death afterwards ensues from the injury, his representatives may sue under section 2 of the statute, and recover an additional sum of \$5,000, thus holding the party liable in two actions to *two different parties* for the *same wrong*.

Inasmuch, therefore, as the literal meaning of the words "any person," as contended for by plaintiff, is at war with the evident intent of the act, and develop the incongruities and inconsistencies above referred to, we think they should be restricted in their literal meaning, if by so restricting them the various sections are made to harmonize in their intent, and reasonable instead of unreasonable conclusions made to follow.

Restricting the meaning of the words "any person," and making them apply only to such persons as are included in section 3, accomplishes this result and relieves the whole question of all difficulty, and makes sections 2 and 3 harmonious in intent. If the statute should be thus read, the representatives of such a person as is described in section 3, dying from an injury received while the railroad was being operated, either from the carelessness of the servants engaged in operating it, or in case of a passenger, from an injury received because of defective road or machinery, would be entitled to recover \$5,000 as damages liquidated by the terms of the act, the only difference between sections 2 and 3, being, that when the death is occasioned by any of the means specified in section 2, the representative to whom the right of action is transmitted shall recover \$5,000, no more and no less; whereas, under sections 3 and 4, the representative to whom the

right of action is transmitted, may recover from one cent to \$5,000. In the one class of transmitted rights, the law absolutely fixes the amount at \$5,000. In the other the amount of damages is left to the discretion of the jury, to be fixed at any sum not exceeding \$5,000, according to the circumstances of the case.

In the case of *Rohback vs. Pac. R. R. Co.*, the words "any person," in a similar statute to the one now before the court, were restricted in their meaning and held to include any person, except a servant or employee of the road, and the same license is allowed in this case as was properly taken in that case.

It is, however said, as opposed to the view expressed herein, that the second clause of the second section creates a cause of action which did not exist before, in providing that in the event of the death of any passenger occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, the corporation in whose employ any such officer or agent shall be at the time the injury is received, or who owns any such railroad, locomotive or car, at the time the injury is committed, shall forfeit and pay the sum of five thousand dollars.

It is said that under this clause the owner of such railroad locomotive or car, may be sued, as contradistinguished from the corporation in whose employ the officer, agent or servant was at the time the injury was committed, which could not be done at common law.

We think that this view is erroneous, and that the word "owner" in this section is used in the sense of proprietor, operator or owner, at the time being when the injury is received. To give it any other meaning would be equivalent to denying any remedy, and would render the remedy intended to be provided, absolutely unavailable. In order that this may appear, it needs but a careful reading of the section, and to read it correctly so as to reach the true meaning, it must be transposed. Transposing the section, it will read thus: "Whenever any person shall die from any injury resulting from or occasioned by the negligence unskillfulness or criminal intent of any officer, agent, servant or employe, whilst running, conducting or managing any locomotive,

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car, or train of cars, * * * the corporation in whose employ any such officer, agent or employe shall be at the time such injury is committed, shall forfeit and pay for every such person so dying the sum of five thousand dollars; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, the corporation who (which) owns any such railroad, locomotive or car, at the time such injury is received, resulting from or occasioned by any defect or deficiency above declared, shall forfeit and pay for every passenger so dying, the sum of five thousand dollars."

The above method of reading the section is obviously the correct method, and we cannot see that it can be read in any other manner. Adopting this reading, and the owner of the defective railroad, locomotive or cars, at the time the injury is inflicted, from which death ensues, becomes liable to pay the sum of five thousand dollars.

The word "owner" in the act does not mean the absolute owner in whom the absolute right of property is invested, but means, and was evidently intended by the draftsmen of the act to mean the owner for the time being, the corporation for the time being, operating, controlling and managing the defective road, locomotive or car. No new right of action is created here, for the passenger, if he had been injured, and lived, could, at common law, have sued the owner for the time being, or the corporation operating and controlling the defective road, locomotive or car. Any other reading or construction of this section, so as to confine the right of action for the death of a passenger, occasioned by a defect in the road or locomotive or cars, against the absolute owner of such railroad, locomotive or cars, would lead to the abolishment of the remedy, and the nullification of the act, so far as the remedy is concerned.

Let us test this by an example: A machinist in New York, engaged in the manufacture of locomotives and cars, hires or leases all the cars and locomotives to the Missouri Pacific Railroad Company which are necessary to operate the road for a period of twenty-five years, at an annual hiring. An injury is inflicted

upon a passenger from a defect in one of these locomotives, while being operated by this company, from which the passenger dies ; if the representatives of the deceased are to sue the owner in New York, could he not reply and say that it was no fault of his which occasioned the injury ; that the locomotive was perfect and complete when it left his hands for the use of the corporation, and that your statute has no extra-territorial vigor, and thus defeat a recovery ? And if the corporation operating the locomotive and the owner of it at the time the injury was committed, were sued, would the corporation be allowed to answer the action by saying that the owner of the defective machinery lived in New York, and thus remit plaintiff to an action against him ? The refutation of such a proposition is found in the statement of it. Nor would it be an answer to say that the interest of the New York owner might be attached and sold ; for in twenty-five years his interest would perish in the use of it. and amount to nothing.

This reading of the section also conclusively refutes the interpretation or meaning given by plaintiff to the words "any person," in the first clause of the second section.

According to the plaintiff's interpretation of these words, the representatives of a fellow servant, injured by the negligence of a fellow servant, while engaged in running and operating the road, without any fault of the master, could sue and recover against the master five thousand dollars, although the servant, had he lived, could not have sued at all for the injury ; yet the representative of the servant whose death was occasioned by defective track or defective machinery, could not sue for and recover anything under the second section, although the servant, had he lived, could have sued the master and have recovered any damage which he may have sustained by reason of an injury inflicted upon him in consequence of a defective road or defective machinery used in operating it.

It seems to us to be a manifest misinterpretation of the second section to construe it so as to say that the legislature in the first clause intended to give the representatives of a servant, who would have had no cause of action had he lived, a right to sue and recover five thousand dollars, and in the second clause of the

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same section denied to the representative of a servant, who would have had a cause of action had he lived, the right to sue and recover damages under that section. And the fact that in the second clause of this section, the legislature, by not extending the right, did deny the right of the representative of a servant, dying from an injury received from a defective road or machinery, to sue and recover under that section, is conclusive proof that they did not intend to include, under the term "any person," a fellow servant injured by the negligence of a fellow servant, without fault of the master.

In the case of *Schultz vs. Pacific Railroad* (36 Mo. 18), a different conclusion was reached from that herein announced. We do not think that the rule was correctly laid down in that case, and have arrived at the conclusions we have after careful deliberation, believing them to embody the true intent of the act, the construction of which was involved. (*Potter's Dwaris on Stat.* 196, 217; 52 Pa. 391; *Phillips vs. Saunders*, 15 Ga. 518; *Noe vs. The People*, 39 Ill. 96.)

In addition to what is here said, we adopt the reasoning of a minority of the court in the case of *Connor vs. Chicago, Rock Island & Pacific Railroad Company* (59 Mo. 285). We think that the court committed error in overruling the objections of defendant to the evidence offered in support of the petition, and that it ought not to have been received for the reasons assigned by defendant, which are copied in a previous part of this opinion. The judgment is reversed, in which Judges Sherwood, Napton and Hough concur.

PER HENRY, J. DISSENTING.

This was an action commenced by plaintiff under the second section of the Damage Act, to recover the penalty of five thousand dollars for the death of her husband, caused by the negligence and unskillfulness of the officers, servants, agents and employees of the defendant, who were fellow-servants of deceased; and the only question for consideration is, whether she is entitled to recover under that section.

In the case of *Schultz vs. The Pacific Railroad* (36 Mo. 13) it was held that that section gave an action to the widow of an employee, whose death was occasioned by the carelessness or negligence of a fellow-servant.

It is insisted that the construction placed upon that section by the court in that case is wrong, and we have listened to many and very able arguments in favor of a different construction. That section is as follows: "Whenever any person shall die from an injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or of any master, pilot, engineer, agent or employee, whilst running, conducting or managing any steamboat or any of the machinery thereof; or of any driver of any stage coach or other public conveyance, whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery thereof, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for and recovered: first, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the

defect or insufficiency named in this section was not of a negligent defect or insufficiency."

The second section does not pretend to, nor does it effect any change of the common law, as to the liability of the master to the servant for injuries sustained by the latter from the neglect or carelessness of a fellow-servant. Neither the Schultz case, nor any other case in this State, has given that effect to the second section. It leaves the common law rule in full force, but if the Schultz case was rightly decided, gives the wife an action in the event of the death of the husband, which neither she, nor any one else had at common law. It derogates from the common law in giving an action to representatives of a decedent, when at common law they had none.

It is urged that the object of the second and third sections was the same, and that the third section is a key to the intent and meaning of the second. The third section is as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, default or neglect is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

The fourth section provides for the recovery of the damages in the third section, by the same parties and in the same manner as provided in the second section, and that the jury may give such damages as they may deem fair and just, not exceeding \$5,000, "with reference to the necessary injury, resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

The second section is penal in its character: The words "forfeit and pay" are punitive. The third section is compensative: "Shall maintain an action and recover damages in respect thereof." The third section was adopted with no other view than to give an action to the representatives named therein, in a case

where the deceased person could have recovered for the injury if he had lived. As to those cases it simply repealed the common law expressed in the maxim, "*Actio personalis moritur cum persona*." It gives no cause of action when the deceased, if he had lived, would have had none. And neither, it is said, does the second section. "It is evident to my mind, from the whole scope of the damage act, that the purpose of the legislature in the second section was simply to cause those actions to survive to certain representatives of the deceased in the cases therein named, which according to the rules of the common law died with the person, and to limit the amount of the recovery in such cases. No new right of action is given by the third section; no new right of action is given to passengers or strangers in the second section. That is to say the right of action which the passenger himself, or a stranger, would have had if injured but not killed, is made, in the event of death, to survive." (Hough J., in the case of Connor vs. Chicago, Rock Island and Pacific R. R. Co., 59 Mo. 308.)

With due deference to the learned judge, for whose opinion we have the highest respect, we think that the second section does give to the representatives of the deceased named therein, an action against parties between whom and the deceased there was no privity, and against whom, at common law, he could not have maintained an action, if he had lived. It gives an action to his representatives when the death of the passenger resulted from any defect or insufficiency in any of the vehicles therein named, against the owner, although the owner may not have been concerned in operating the railroad or running the steamboat, stage, coach or other public conveyance.

It cannot be maintained, that by the word "owner" was meant the company or persons operating the road, etc. The section distinguishes between them by providing that the action by representatives of persons included in the first member of the section, may be maintained against the individuals or corporation in whose employ such agent, officer, etc., shall be at the time, and that the representatives of a passenger shall have an action against the owner of such railroad, etc.

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As expressed by Holmes, J., in the Schultz case: "When the liability of the employer is declared, in reference to the first clause, it is the corporation or individuals in whose employ such officer, agent, servant or employee shall be at the time the injury is committed, that is to be liable, and plainly in respect of the negligence, unskillfulness or criminal intent of such officer, agent or employee, whilst running, conducting or managing the engine, cars or trains, but when the other clause, relating to passengers only, becomes the subject of the sentence, it is the corporation or individual who owns the railroad, locomotive, car or train in which the defect or insufficiency, which is the ground of liability, may exist, that is declared to be liable."

It gives no action to the representatives of one killed in consequence of defective vehicles, against the operator, unless he also be the owner, while the third section gives no action to the representatives against the owner, but only against the operator, when the deceased would have had an action had he lived.

As between the passenger and the company or persons operating the road, for an injury resulting from defective machinery, he has his common law action, or if he die of the injury, his representatives have an action under the third section, because the deceased, if he had lived, would have had an action at common law. The third section completely accomplishes the purpose of its enactment, which was to prevent the abatement of common causes of action; and the fact that it refers, for convenience, to so much of the second section as provides who may sue, affords no foundation whatever for the position that it is the key to the construction of the second section. If it had embodied in terms that portion of the second section providing who may sue and all of the fourth section, it would have been complete and perfect in itself, and carried out what may be fairly regarded as the legislative intent on that subject. If the fourth section had been entirely omitted from the statute, and the third section had contained that part of the second section above indicated, it would have been complete, for the representatives would then have had an action, and there would have been no limit to the damages they might have recovered.

We thus see clearly the purpose of the third section, and think we have shown that, in some important respects, there is a very material difference between the two sections. While they had one purpose in common, to give a right of action to representatives of deceased persons, the second section had also another object in view. We have said before, that that section is penal, while the third section is compensative. The one declares that the company or persons and the owner shall "forfeit and pay," and the other, that the corporation or person "shall be liable to an action for damages." Common carriers have always been held to a strict responsibility for the safety of goods and passengers carried by them, but since the introduction of means of conveyance by steam has so greatly increased the perils to passengers, the common law liability of common carriers has been found inadequate to hold persons controlling those dangerous means of conveyance to the exercise of due care in their operation and management, and the legislature has deemed it necessary by enactment, penal and otherwise, to compel them to the exercise of care equal to the perils incident to the business they are engaged in.

It is said that the rule of the common law exempting the master from liability to a servant for the carelessness of his fellow servant, is salutary, in conducing to the safety of the traveling public, by making each servant more observant of the conduct of his fellow servant, and more interested to report to the master any misconduct or incapacity of a co-employee, and this is regarded as an argument against the construction of the statute declared in the Schultz case.

We grant that the common law rule may have that effect upon servants, but if so, has it not a corresponding effect to make the master less careful in the selection and oversight of his employees? It works both ways, if either, and then the second section, leaving the common law intact as between the master and the servant, gives a penalty of \$5,000 against the master when a servant is killed by the negligence of a fellow servant. The common law rule makes the servant more careful and watchful, and the statute makes the master more careful in the selection of

his servant. Nor does the statute weaken the force of the common law rule upon the conduct of servants.

The servant derived no benefit from the penalty imposed by the statute, and the fact that his wife may get \$5,000 for his death is not apt to make him less careful to preserve his life.

There may be exceptional cases, but no man whose mind is in a normal condition would be influenced by that consideration to relax his carefulness to avoid a disaster which might result in his own death.

Another circumstance showing the penal character of the second section is that it fixes the amount of the recovery, inflexibly, at \$5,000.

A man may be a vagabond, a curse, instead of a comfort to his family, consuming the earnings of his wife and children in debauchery, and disgracing them by his indecency and dissipation, yet if killed under the circumstances bringing the case under the second section, his representatives recover \$5,000, and the jury can give no less.

If, on the other hand, the person killed be an honor and comfort to his family, earning thousands by his industry and spending it liberally for their benefit, his representatives can recover but \$5,000, while under the third and fourth sections the jury can consider the character of the deceased in determining what amount to allow within the maximum.

If we divide the two members of the second section and make each complete in itself, by appropriating to each member the language of the section applicable to it alone, without adding or striking out a word, the proper construction of the section will be more readily perceived.

The learned judge who delivered the opinion of the court in *Connor vs. Chicago, Rock Island & Pac. R. R. Co.* says: "The interpretation of the second section advanced in the *Schultz* case, enlarges the rights of the employees under the first clause, and abolishes the distinction between them and passengers, but destroys their right under the second clause, where passengers only are named, and where the employees of the company, under the law as it existed before the passage of the act, were con-

ceded to have a right of action, and where passengers also clearly had always a right of action apart from any legislative enactment. This seems strange in a law supposed and asserted to have had in view a change of the law as established in the case of *McDermot vs. Pac. R. R.* (30 Mo. 115.) Now in that case and in all cases that have followed (and they have been numerous) the right of an employee (as well as passenger) to recover for injuries occasioned by defective machinery, etc., is conceded. But adopting the literal interpretation of the second section as given in the case of *Schultz*, as the word 'passenger' alone is used in the second clause, this right of the employee is destroyed so far as his representatives are concerned, in the event of his death." We submit with due deference to the great learning and ability of the distinguished judge that this is a misconception of the statute. It destroys no right whatever. In giving the representatives of a passenger an action against the owner of the vehicle, it takes away no right of action that he had at common law against the company or person running it. What right of the representative of a servant is destroyed?

The representative had no right until the section gave it, and giving representatives of a passenger an action not before maintainable, certainly deprives no one of a right of action because he is not also provided for. That section leaves the servant, as it does the passenger, his common law action against the master for injury sustained in consequence of defective machinery. We are at a loss to comprehend how a literal construction of the statute destroys any right of action, that either a servant, or passenger, could have maintained at common law.

If the construction contended for by appellant be the true one, then all of the second section is nugatory and tautological, except that portion of the section prescribing who shall sue, and the amount of the recovery, all of which could have been incorporated in the fourth section as well thus :

"All damages accruing under the last preceding section (3rd) shall be sued for and recovered ; first, by the husband and wife of the deceased ; or second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by

the minor child, or children of the deceased ; or third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit, and each shall have an equal interest in the judgment ; or if either of them be dead, then by the survivor, and in every such action, except as hereinafter provided, the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having due regard to the aggravating or mitigating circumstances attending such wrongful act, neglect or default ; provided that in suits instituted under the foregoing section, for the death of a party occasioned by the neglect, carelessness or criminal intent of officers, agents, or employees, or of defective machinery or vehicles of common carriers of passengers the representatives shall recover, if at all, \$5,000." We omit all of the last sentence of the third section, because that is wholly unnecessary in the view of the statute taken by appellant.

If the section, as we have written it, would have accomplished all that is accomplished by the second, third and fourth sections as they now stand, it is an irresistible argument that something more was meant by the legislature in the enactment of the second section than to revive suits and fix the amount of recovery.

The construction contended for by appellant would make the first and second members of that section unmeaning verbiage, or senseless tautology ; and if the ordinary meaning of the words employed will disclose another intent than that to be found in the other sections of the act, that meaning must be given to the words rather than declare that a legislative enactment is without meaning.

But it is said, if one be injured and sue and recover damages at common law and afterwards die of the injury, his representatives can then sue and recover the penalty, if the Schultz case properly construed section two. I confess that I cannot comprehend the argument. It is conceded that the words "any person" in that section include passengers, and we are not called upon in this case to determine whether, if the passenger or servant sue for his injury and then die, his representatives can then sue for the pen-

alty. So far as the servant is concerned, if the circumstances under which he was injured were such that he could sue for an injury sustained in consequence of the neglect of a fellow-servant, at common law his representatives would occupy precisely the same ground as those of a passenger, so far as this section is concerned.

With regard to injuries received by the servant in consequence of mere carelessness and negligence of a fellow-servant, the second section gives the injured servant no action whatever, and the case supposed could no more occur in the case of a servant than in the case of a passenger, who it is admitted, is included in the words "any person." It might be argued, that the right of the representatives to sue in cases where, if the deceased had lived, he could have sued, is a transmitted right, but the right of a representative of a servant to sue unless the injury were such that at common law the servant himself could have sued, is not a transmitted right. It is a right created by the statute, in favor of the representatives of the deceased, and the penalty might have been given as well to an informer, and then there would have been no controversy as to the meaning of the section.

So in the case of a passenger killed in consequence of defective machinery, as he, if he had lived, could have had no suit against the owner, but only the operator, the right given to his representatives against the owner is not a transmitted right.

Many hard cases, characterized as absurd, are mentioned as unprovided for by the statute. As an instance, a servant injured but not killed by the negligence of a fellow-servant can have no action against the master, although he may be maimed for life and rendered a charge upon his family; yet if he die the representatives can recover \$5,000, and it is urged that such could not have been the intent of the statute. That the statute does not provide for all cases which we may think should have been included, is certainly no reason for the determining that it does not embrace the cases which are within its terms.

The legislature may have thought best to have the common law rule in force as to the *servant himself*, but we cannot see that it therefore follows, that his representatives should not have an ac-

tion for his death, when the language of the law is broad enough to give it.

If there were anything in the second, or any other section of the act restricting the meaning of the "any person," to the exclusion of servants, this court, we presume, would not hesitate to give it that construction.

If any were necessary, the authorities as to the duty of courts in construing obscure or ambiguous statutes to reject or supply words, in cases where it becomes necessary to do so in order to make them intelligible and to effectuate the obvious intent of the law maker are ample to sustain the position of appellant's counsel, but in my judgment there is no such obscurity or ambiguity in the second section as will authorize the court to reject "the plain, ordinary, or usual sense" of the words "any person" occurring in that section.

The act was passed in 1855. The Schultz case was determined by this court in 1865. Rohback vs. The Pacific R. R., 43 Mo. was decided in 1869. The construction placed upon that section, in the Schultz case, was never questioned until the case of Connor vs. Chicago, R. I. & Pac. R. R. Co. was before this court in 1875.

If the second section was in fact as ambiguous as is urged, and the construction placed upon it wrong, yet the acquiescence of the bar, of the court and of the general assembly in that construction for such length of time, is a consideration which should make the court hesitate to adopt a different one. The general assembly of the State has met every year, in regular, adjourned, or called sessions since the decision in the Schultz case, and no proposition, so far as we are advised has ever been made in that body to amend the law; and while that decision was not strictly made a rule of property, yet the doctrine of that case has so long prevailed as to become the recognized law of the land, and if it work any injustice, or contravene public policy, it is better for the legislature to remedy the evil by amending or repealing the law, than for this court to do it by judicial construction.

As the instructions given by the court for the plaintiff were in accordance with the doctrine of the Schultz case, I think that the judgment of the circuit court should be affirmed.

State v. Taylor.

STATE OF MISSOURI, Defendant in Error, *vs.* ENOCH P. TAYLOR,
Plaintiff in Error.

1. *Indictment—Change of venue—Testimony—Action of lower court—Review of*—Where, in a criminal case, on an application for change of venue on the ground of prejudice against the prisoner, testimony is offered *pro* and *con* (See Sess. Acts 1875, p. 109) the Supreme Court will not interfere with the action of the trial court in overruling the motion.
2. *Practice, Supreme Court—Evidence—Instruction—Bill of exceptions—*Evidence and instructions not incorporated in bill of exceptions will not be reviewed by Supreme Court.

Error to Clark Circuit Court.

Lay & Belch, for Plaintiffs in Error.

J. L. Smith, Atty Gen'l, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The defendant was indicted for murder, and, on trial had, was convicted of that offense in the second degree, and sentenced, as a punishment, to imprisonment in the penitentiary for the term of ten years.

I.

There was no error in refusing the change of venue for which defendant applied. Although testimony was adduced in his behalf, tending to establish the existence of prejudice, yet the prosecuting attorney, under the act approved March 18th, 1875, (Laws of that year p. 109,) offered testimony of a contrary effect in rebuttal. This being the case, we shall not undertake to weigh the testimony.

II.

Nor can we review the action of the trial court in the admission or rejection of evidence, or in the giving or refusal of instructions, since neither evidence or instructions have been incorporated in, or referred to, in the bill of exceptions. Our rulings on this point, have been of such frequency, as to render their citation altogether superfluous.

Judgment affirmed. All the other judges concur.

Lincoln v. Rowe, et al.

***JAMES E. LINCOLN, Defendant in Error, vs. THOMAS ROWE, et al., Plaintiffs in Error.**

1. *Wife's note—Action to subject separate estate to the payment of—Judgment before justice.*—In an action to subject a married woman's separate estate to the payment of a note signed by herself and husband, the latter being totally insolvent, it is immaterial that judgment has been rendered thereon against herself and husband, before a justice of the peace.
2. *Homestead exemption, claim for as against debt—Homestead deed.*—A claim for homestead exemption, in order to avail against a debt, must rest upon a deed executed anterior to the creation of the debt. (Wagn. Stat. 698, § 7.)

Error to Clay Circuit Court.

Jno. G. Woods, for Plaintiffs in Error, cited: *Urquhart vs. Smith*, 5 Kas. 447; *Wilson vs. Boughton*, 50 Mo. 17; *Watson vs. Field*, 10 Mo. 100; *Ashley vs. Gleason*, 7 Mo. 32; *Hill vs. City of St. Louis*, 20 Mo., 584; *Smith vs. Best*, 42 Mo. 185; *Boon vs. Miller's Ex'r*, 16 Mo. 457; *Hendrickson, Adm'r, vs. St. Louis, &c.*, 34 Mo. 188; *Freem. Judgm.*, 210, 227; 1 Sto. Eq., § 166.

Sam'l Hardwick, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff sought in the court below to subject the separate estate of Nancy, the co-defendant and wife of the defendant, Thomas Rowe, to the payment of a promissory note alleged to have been signed by her, and was successful, a decree having been entered as prayed.

I.

The note having been declared on as lost or destroyed, it was unnecessary that its execution should be denied under oath. (Wagn. Stat. 1046, § 45.) But when we consider the numerous quibbles and evasions of defendants' lack-andor answer, wherein they repeatedly deny, and then seemingly admit, the note's execution by Nancy; when we couple this with somewhat of the circumstantial evidence tending to show that she signed the note, we are unprepared to say that the trial court acted without evidence of the execution of the note by her; and we are equally

*For a former report of this case see 51 Mo. 571.

State ex rel. Berry v. McGrath.

unwilling to disobey our statutory duty of discouraging, as far as possible, deceit in pleading and of securing parties from being misled. (Wagn. Stat. 1037, § 23.) Regarding, then, the note as signed by the wife, the usual result will attend her act.

II.

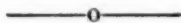
Nor is it a matter at all important that a judgment had been rendered on the note before a justice of the peace, against both Thomas and Nancy; for the judgment was a practical nullity as to the former, he being "notoriously insolvent," and a legal nullity as to the latter, a married woman, as to whom no valid judgment at law could be rendered. (Gage vs. Gates, 62 Mo. 412.)

III.

In relation to the claim which Nancy makes for a homestead in a portion of the land sought to be subjected to sale, to satisfy the plaintiff's note, it is enough to say that it will be time to pass on that point when it shall appear that the homestead she claims ever had a legal commencement by filing the deed therefor for record, and that such filing occurred anterior to the creation of the debt whose recovery plaintiff seeks. (Shindler vs. Givens, 63 Mo. 394.)

In the absence of testimony in these particulars, we certainly shall not assume that Nancy has acquired a homestead, or that her debt to plaintiff was contracted subsequently to such acquisition.

The judgment is affirmed. Judges Norton and Henry not sitting; the other judges concur.



STATE OF MISSOURI, *ex rel.* JAMES BERRY, Relator, vs. MICHAEL K. McGRATH, Secretary of State, Respondent.

1. *Court, circuit—Resignation of judge to take effect at subsequent date—Election of successor, prior thereto, effect of.*—Where the judge of a circuit court in July, 1876, transmitted to the governor of the State his resignation, the same, by its terms, to take effect in December of that year, its acceptance prior thereto would not vacate his office till the latter date, and an election of his successor prior to December, 1876, would be invalid. (See Const. 1875, Art. VI, § 32; Wagn. Stat. p. 572, § 46; Sess. Acts 1873, p. 43.)

State ex rel. Berry v. McGrath.

Petition for Mandamus.

B. G. Barrow, for Relator.

J. L. Smith, At'y Gen'l, for Respondent.

HOUGH, Judge delivered the opinion of the court.

This is an application for a writ of mandamus to compel the Secretary of State to cast up and certify to the governor the votes polled for the relator, in the counties composing the 27th Judicial Circuit, for the office of judge of that circuit, at the general election in November, 1876.

It appears from the petition that in the month of July, 1876, Judge John W. Henry, then judge of said circuit, transmitted to the governor his resignation of said office, which resignation was expressed to take effect on the 31st day of December, 1876, and was accepted by the governor to take effect on that day; that at the general election in November, 1876, the relator was, with others, a candidate for said office, was eligible thereto, and received a majority of all the votes cast for the several candidates therefor, and that said votes were duly returned to and are now in the custody of the secretary of State, and that he refuses to count and certify the same. The next general election for circuit judges is fixed by law to occur in November, 1880.

Section 32 of Article VI of the Constitution of 1875, provides that "in case the office of judge of any court of record becomes vacant by death, resignation, removal, failure to qualify, or otherwise, such vacancy, shall be filled in the manner provided by law."

The sole question presented for our determination by the application of the relator is, whether there was any law authorizing the election of a successor to Judge Henry at the general election in November, 1876. By section 46 of the general statutes on the subject of elections, it is provided, that when any vacancy shall happen in the office of judge of the Supreme Court, judge of the circuit court, and other offices therein named, by death, resignation or otherwise, the governor upon being satisfied *that such vacancy exists*, and that it occurred more than twelve months be-

fore a general election for such officer, shall issue his writ of election to fill such vacancy.

In March, 1873, an act was passed providing that in all cases of vacancy in any office, the length of the term of which is over two years, the vacancy shall be filled by the election of some person to the office at the first general election, *after such office becomes vacant*.

We are not aware of any other statutory provisions on this subject. The act of 1873 repealed all acts and parts of acts inconsistent with its provisions, and was doubtless intended to supersede the provisions of section 46 of the General Statutes, so far as the same related to judges.

Giving the relator, however, the benefit of both statutes, and conceding that both of them were in harmony with the constitution which was in force at the time they were enacted—on which subject it is unnecessary for us, at this time, to express any opinion—and waiving the fact that no writ of election was issued by the governor, it is quite plain that no election could be held under the provisions of either of them, for a successor to Judge Henry, until after the office held by him became vacant. If the foregoing statutes were in conflict with the constitution, there would be no authority whatever for an election, and the vacancy would be properly filled by appointment. Now, notwithstanding the fact that Judge Henry's resignation was transmitted to the governor in July, 1876, he continued to be judge of the 27th Judicial Circuit until the 31st day of December, 1876. On that day, and not before, did his resignation take effect, no matter when it was accepted by the governor. From that day, and not before, did his office become vacant. As the relator claims to have been elected prior to that time, he was elected before any vacancy existed and without authority of law. The writ will be denied.

The other judges concur, except Judges Norton and Henry not sitting.

Angell v. Hester.

M. S. ANGELL, Plaintiff in Error, vs. DAVID HESTER, Defendant in Error.

1. *Witness act*—Where party to contract, etc. is dead, opposite party incompetent for any purpose.—In suit by the indorsee against the maker of a promissory note, the payee whereof is dead at the date of the suit, defendant cannot testify as to a payment on the note made by himself to the payee. And he is incompetent to testify at all in the case.
2. *Witness act*—Common law right to testify, not affected by.—Under the witness act (Wagn. Stat. 1872, § 1), in any case where at common law a party to a suit could testify, he may still do so, notwithstanding the death of the other party to the contract or cause of action.

Error to St. Clair Circuit Court.

Frank H. Clark, for Plaintiff in Error, cited: *Stanton vs. Ryan*, 41 Mo. 510; *State ex rel. Townshend, Adm'r, vs. Meagher*, 44 Mo. 356; *Johnson vs. Quarles*, 46 Mo. 423; *Looker vs. Davis*, 47 Mo. 140; *Byrne vs. McDonald*, 1 Allen, 295; *Hubbard vs. Chapin*, 2 Allen, 328; *Granger vs. Bassett*, 98 Mass. 458; *Manuf. Bank vs. Schofield*, 39 Vt. 590.

R. S. Emmons, for Defendant in Error.

HENRY, Judge, delivered the opinion of the court.

This was an action by plaintiff against defendant on a promissory note executed by defendant, and payable to one E. S. Tyler, for the sum of two hundred and fifty dollars, and by said Tyler assigned to plaintiff.

The answer admitted the execution of the note and the assignment to plaintiffs, but alleges that before the assignment of the note to plaintiff, he made a payment thereon to Tyler of one hundred and fifty dollars.

At the March adjourned term of said court held in May, 1874, there was a trial of said cause by the court without a jury, both parties consenting, and the finding of the court was for plaintiff, allowing defendant a credit of one hundred and fifty dollars. In proper time plaintiff filed his motion for a new trial, which was overruled, and the court gave judgment in accordance with its finding, from which plaintiff has appealed to this court.

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It was proven on the trial that Tyler, the payee of the note, was dead. Defendant offered himself as a witness to prove the alleged payment. Plaintiff objected to his testifying, on the ground that he was incompetent as a witness; but the court overruled the objection and permitted him to testify, and his evidence established the payment.

The statute provides that, "no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided that in actions where one of the original parties to the contract, or cause of action in issue and on trial, is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor."

The contract sued on was the note executed by the defendant. The party with whom that contract was made was dead, and by the express terms of the statute the defendant could not be admitted to testify. The payment which he pleads was made, if at all, to Tyler, the payee, and it was in regard to that payment that he was permitted to testify.

In *Looker vs. Davis* (47 Mo. 145) it is said that, "the proviso relates wholly to persons who are parties to the suit, the issue arising in which is on trial, and not to others who were merely parties to the original contract. The object and purpose of the statute was undoubtedly to put the two parties to a suit upon terms of substantial equality in regard to the opportunity of giving testimony." While this language is a little obscure, the meaning of the court is clearly expressed in the succeeding paragraph: "If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction, being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case."

The case of *Byron vs. McDonald* (1 Allen, 293) was a suit by the indorsee against the maker of a note, the payee being dead. The defendant offered himself as a witness, but his testimony was rejected. Bigelow, C. J., said: "The testimony of the defendant was rightly rejected. The payee of the note was dead. He

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was one of the original parties to the contract, or cause of action in issue and on trial. By the express terms of the proviso the other party to the contract cannot in such case be admitted to testify in his own favor. The defendant being the promissor of the note declared on, was clearly within the exact letter of the statute." To the same effect is *Hubbard vs. Chapin* 2 Allen, 328 ; *Granger vs. Bassett*, 98 Mass. 462 ; *Manuf. Bank vs. Schofield*, 39 Vt. 593. Our statute is precisely like that of Vermont and Massachusetts, and was copied from the statute of one of those States.

In the case of *Granger vs. Bassett* (98 Mass. 462), Wells, J., who delivered the opinion of the court, says : "The test of competency is the contract or cause of action in issue and on trial, not the fact to which the party is called to testify. If the cause of action was a matter transacted with a person who has deceased, the other party to that transaction being also a party to the suit, is not admitted as a witness at all, and cannot testify to any fact in the case. Otherwise he is admitted as a witness, and being so admitted, the statute contains no restrictions nor limitations as to the facts to which his testimony may or may not be directed. His competency must be determined in advance by the nature of the controversy and the question in issue. If, upon that test, he is admitted as a witness in the case, his testimony is competent for all purposes, although it may relate to transactions with a person since deceased, which prove to be involved in or to affect the matter in dispute."

We take the true distinction to be, that where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party to such contract or cause of action will not be permitted to testify to any fact which he would not have been permitted to testify to at common law ; that where one of the parties is dead, the other party stands in regard to testifying precisely as if the statute allowing persons to testify had not been enacted.

At common law there were exceptions to the rule excluding parties to the suit and persons interested in the event of the suit from testifying, and in any case where at common law a party

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to the suit could testify, he may still testify, notwithstanding the death of the other party to the contract or cause of action.

It is clear that in admitting the defendant to testify the court erred, and with the concurrence of the other judges its judgment is reversed, and the cause remanded.

—o—

E. G. PARIS, Respondent, vs. JAMES ABBOTT, Appellant.

1. *Probate and Common Pleas Court of Greene County*—Circuit court has only appellate power over.—Where a cause is appealed from the Probate and Common Pleas Court of Greene County to the circuit court of the same county, and no exceptions are taken or saved in the former court, the latter cannot review or revise anything but error patent of record. It has no jurisdiction to try the case anew. (McCraw vs. Hubble, 61 Mo. 107.)

Appeal from Greene Circuit Court.

Massey, McAfee & Phelps, for Appellant, cited: Hubble vs. McCraw, 61 Mo. 107; Robinson vs. Walker, 45 Mo. 117; 4 Cow. 80; 1 Murphy, (N. C.) 495; 9 Cow. 229.

Bray & Cravens, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Paris had a claim allowed in the Probate and Common Pleas Court of Greene County, against the estate of Lindenbower. The administrator appealed to the circuit court, where, upon a trial *de novo*, the result was the same as before. No exceptions were taken or saved in the Probate and Common Pleas Court, and consequently there was nothing left for the circuit court to review and revise but error patent of record; and that court had no jurisdiction to try the cause anew. This was so ruled in McCraw vs. Hubble, Adm'r (61 Mo. 107). We have, however, examined the record, and, finding no error therein, shall reverse the judgment of the circuit court, and proceed to do that which that court should, under the circumstances have done, affirm the judgment of the Probate and Common Pleas Court.

All the judges concur.

State v. Dooly.

STATE OF MISSOURI, Defendant in Error, *vs.* HENRY W. DOOLY,
Plaintiff in Error.

1. *Indictment—Larceny—Failure to specify articles stolen—Defective charge as to larceny—Effect of upon conviction of burglary, where indictment charges both.*—Where an indictment charges that defendant "burglariously and feloniously, etc.," entered a house "with intent to commit larceny by taking and carrying away, etc." certain specified goods, and adds in a separate clause that he did then "burglariously and feloniously steal, take and carry away, contrary" etc., the indictment is fatally defective, the phrase "by taking and carrying away, etc.," not being an affirmative allegation of stealing; and the second clause failing to designate what was stolen. And defendant being charged with both larceny and burglary and being convicted in the same verdict of both, and there being nothing on which to base the verdict as to the former, judgment and sentence cannot stand as to the latter.
2. *Indictment—Burglary—What charge of sufficient.*—An indictment which distinctly and with reasonable particularity charges the felonious and burglarious breaking and entering into a house, and the felonious intent thereby to commit larceny, is a sufficient charge of burglary.
3. *Practice criminal—Record—Failure to show presence of prisoner at verdict—Effect of.*—On an indictment for felony, the failure of the record to show affirmatively that the prisoner was present at the rendition of the verdict will operate a reversal of the cause.

Error to Howard Circuit Court.

J. B. Clark & Son, with Jas. H. Robinson, for Plaintiff in Error, cited: State vs. Henly, 30 Mo. 509; Wagn. Stat. pp. 454, 455, §§ 10-17; Bish. Crim. Law 5 Ed. Vol. 2, §§ 90, 92, 99; Kell. Crim. L. & P., § 559; State vs. Jones, 61 Mo. 232; Wagn. Stat. 513, § 9; 455, § 19; 1108, § 4; Kell. Prac. § 421.

J. L. Smith, Att'y Gen'l, for Defendant in Error, cited: State vs. Henly, 30 Mo. 509; Hale, 560; 2 East P. C. Ch. 15, § 15, 514; Rex vs. Furinal, Bush, Ky. 445; 2 Arch. Cr. Pl. & Pr., p. 329; Bish. Crim. Law, 5 Ed. Vol. 2, § 116; Jones vs. State, 11 N. H. 270; Com. vs. Brown, 3 Rawle, 207; State vs. Ayer, 3 Frost, 301; Rose. Crim. Ev. (4 Am. Ed.) 364, 366; *In re Tweed*, 60 N. Y., 445, and authorities there cited.

HENRY, Judge, delivered the opinion of the court.

At the December term 1875 of the Circuit court of Howard County, the grand jury returned the following indictment against Henry Dooley:

"The grand jury for the State of Missouri for the body of the county of Howard, charged and sworn, upon their oath present, that Henry Dooley, William Todd and William Ogg, all late of the county of Howard aforesaid, on the twenty-fourth day of June, 1875, feloniously, burglariously and forcibly, at the county aforesaid, did break into and enter a certain smoke house and building, the property of Andrew C. Tolson, then and there being, by breaking down the door of said smoke house and building, in which said smoke house and building there were then and there at the time aforesaid, goods, wares and merchandise, and other valuable things kept and deposited; that the said Henry Dooley, William Todd and William Ogg, so broke and entered into said smoke house and building, with the intent then and there to commit a larceny by then and there stealing, taking, and carrying away the goods, chattels and personal property of the said Andrew C. Tolson in said smoke house and building kept and deposited; to-wit, ten pieces of bacon of the value of thirty dollars then and there being found in said smoke house and building.

They, the said Henry Dooley, William Todd, and William Ogg, did then and there, burglariously and feloniously steal, take and carry away, contrary" etc.

At the April term of said court A. D. 1876, there was a trial of said cause which resulted in the conviction of defendant, Dooley, of both burglary and larceny; of burglary in the second degree, the jury assessing his punishment at imprisonment in the penitentiary for a term of three years, and of larceny, the jury assessing his punishment at like imprisonment for a term of two years.

In due time he filed his motion for a new trial, which was overruled, and thereupon he filed a motion in arrest of judgment, which was also by the court overruled. As neither the evidence nor the instructions given by the court are preserved, the points made by defendant, on his motion for a new trial, will not be considered. The motion in arrest presents the following questions viz: Is the indictment sufficient to charge the crime of burglary, and larceny, or either? Are the judgment and sentence warranted by the verdict? Does the record fail to show that defend-

ant Dooley was personally present in court, when the jury returned their verdict into court, and if so, is it an error for which the judgment should be reversed?

It will be observed that the first paragraph of the indictment, copied above exactly as it appears on the record, charges the breaking and entering into the smoke house by the defendant. The second paragraph contains the allegation of the intent with which it was done.

It is not alleged therein that defendant stole the ten pieces of bacon. There is no more stated in the first two paragraphs, than that the defendant feloniously and burglariously broke and entered into the smoke house, with intent then and there to commit a larceny by taking and carrying away, goods, chattels and personal property.

The words "by taking and carrying, etc.," are not a charge that they did steal, but is only a statement of the manner in which they intended to commit a larceny.

The concluding paragraph is as follows: "They, the said Henry Dooley, William Todd and William Ogg, did then and there, burglariously and feloniously steal, take and carry away contrary, etc." "Steal, take, and carry away," what? The ten pieces of bacon: There is no reference to the bacon whatever, in that sentence. It was only mentioned in the preceding paragraph, to show the intent of the defendant in breaking and entering into the smoke house.

It may have been, and it may be conceded that it was, the intention of the pleader to charge that the defendant stole the meat, but it will not do to imprison one in the penitentiary, on an indictment in which it was intended to charge a criminal offense, unless the crime is distinctly charged.

As the indictment is insufficient to charge the defendant with larceny, and the jury found him guilty of both larceny and burglary, the verdict will not sustain the judgment and sentence, since there is no indictment to sustain a portion of the verdict.

From what has already been said, it will be perceived that we hold that the indictment for the charge of burglary is sufficient. It distinctly charges the felonious and burglarious breaking and

entering into the smoke house, and the felonious intent thereby to commit larceny, with reasonable particularity.

The record shows that on the second day of the term, being the 4th day of April, 1876, the defendant Dooley was present in court in person, but it nowhere appears in the record that on the next day, when the jury returned their verdict into court, Dooley was present. This court has repeatedly held, that unless it affirmatively appear from the record that a defendant, tried for a felony, was personally present during the trial, the judgment should be reversed. (*State vs. Buckner*, 25 Mo. 167; *State vs. Cross*, 27 Mo. 332; *State vs. Schoenwald*, 31 Mo. 147; *State vs. Braunschweig*, 36 Mo. 397; *State vs. Jones*, 61 Mo. 232.)

In the case of the *State vs. Cross*, the record, in regard to the presence of the prisoner in court during the trial, was precisely like the record in this case, and Napton J., who delivered the opinion of the court on that point, says: "We do not infer because the record shows the defendant was present in court on one day, that he was therefore present on the following day."

For the errors above indicated, with the concurrence of the other judges, the judgment of the circuit court is reversed and the cause remanded, to be proceeded with in conformity to this opinion.

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SAM'L P. TATE, Respondent, vs. M., K. & T. RAILWAY COMPANY, Appellant.

1. *Evidence—Value of property—Opinion of witness.*—In cases involving the value of property, the opinion of witnesses familiar therewith may be received.
2. *Corporations, municipal—Liability of in damages for grading of streets.*—It is the settled law of this State that a municipal corporation is not liable for damages indirectly resulting to the proprietors of lots within the corporation, from the grading of streets or from changes in the grade, authorized by the municipality.
3. *Corporations, municipal—Liability for occupation of streets by railroads.*—Where a municipal charter so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipality nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. But this rule applies only to a railroad con-

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structed on the grade of the street, where the only obstruction is the passage of the trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road.

4. *Instructions not misleading, revision of by Supreme Court.*—It is not to be expected that instructions in a *nisi prius* court will not be subject to criticism. It is only proper for a revising court to see that in the main they are not calculated to mislead.
5. *Railroad—Lessee—Nuisance, liability for.*—A party in whose possession and control a railroad is placed, with power to continue its use, is equally liable with the original owner for a nuisance arising from the manner of its construction.

Appeal from Randolph Circuit Court.

Plaintiff sued to recover damages occasioned his lots, which abut on Moulton street, in Moberly, by reason of the building and construction of the railroad bed and track on the street in front of his lots, and the throwing up of an embankment in front thereof.

The plaintiff introduced evidence tending to prove his ownership and possession of the lots, their location and surrounding; that Moulton street was a public street in the town of Moberly, ninety feet in width, and extended in front of his lots; that in the early part of 1873, the railroad and road-bed, cross-ties, track, etc., were built and constructed on Moulton street, and a grade and embankment therefor, from two to six feet in height, thrown up in front of plaintiff's lots; that since the construction of said railroad it was operated by appellant, and appellant stood cars thereon for loading and unloading.

Plaintiff also introduced in evidence a resolution of the board of trustees of the town of Moberly, authorizing the appellant to construct the railroad over and upon Moulton street.

Defendant then introduced evidence tending to show that the Tebo & Neosho Railroad Company, under its charter, was located and established, from Boonville by way of Fayette, to Moberly, and over said Moulton Street in front of these lots.

For other facts see opinion of court.

John Montgomery, Jr., for Appellant.

The instructions do not properly declare the law. Where the railroad company is authorized by its charter, or the ordinances of a city, to construct a railroad over any of its streets, they have a right to do so, and to use it for the ordinary purposes of a railroad, as a means of travel and transportation. (*Porter vs. N. Mo. R. R. Co.*, 33 Mo. 137; *Lackland, Adm'r, vs. N. Mo. R. R. Co.*, 34 Mo. 274; *Lackland, Adm'r, vs. N. Mo. R. R. Co.*, 31 Mo. 186.)

In the case in 33 Mo. *supra*, the court says such damages as grow out of the construction of a grade and embankment upon a portion of the street are *damnum absque injuria*. And the doctrine is supported by authority. (1 Redf. R. R., 259, § 70; also p. 316; *Elliott vs. Fair Haven & Westville R. R. Co.*, 32 Conn. 580; *New Albany R. R. Co. vs. Daily*, 12 Ind. 551; *Nicholson vs. N. Y. & New Haven R. R.* 22, Conn. 82; *Gould vs. Hudson River R. R. Co.*, 2 Seld. 538.)

The difficulty of crossing a railroad track, the detention by trains, the frightening of horses, the danger to persons crossing the track, the noise of the train and various other things that might be named, are inconveniences which property owners, on a street where a railroad is located, have to suffer; and yet to hold that such could recover damages, would in effect prevent the construction of a railroad upon a public street. (*Stone vs. Fairbury & N. W. R. R. Co.*, 68 Ill. 394; 113 Mass. 58; *Moses vs. Pittsburg, Fort Wayne & Chicago R. R. Co.*, 21 Ill. 522; *Proprietor of Locks and Canals vs. Nashua & Lowell R. R. Co.*, 10 Cush. 385.)

For works of a public nature erected by authority of the legislature, unless the statute makes provision for the recovery of consequential damages, no action can be maintained therefor, if the work be constructed in a careful and prudent manner. (*City of St. Louis vs. Gurno*, 12 Mo. 418; *Lambert vs. City of St. Louis*, 15 Mo. 185; *Proprietors of Locks and Canals vs. Nashua & Lowell R. R. Co.*, 10 Cush. 385; 8 Gray, 423; 23 Barb. 488; 49 Barb. 121; 16 Barb. 106; *Mellon vs. West R. R.*

Corp., 4 Gray, 301 ; Lackland vs. N. Mo. R. R. Co., 31 Mo. 185.)

The use which defendant was authorized and had a right to make of this street, was to occupy it with its track and run its cars and trains thereon in the usual course of its business, and unless the defendant constructed its road in an improper manner, or wantonly or negligently ran its cars so as to cause needless damages to abutting property, no action for damages can be maintained. (*Hatch vs. Vermont Cent. R. R.*, 25 Vt. 49 ; *Whitcomb vs. Same*, 25 Vt. 49 ; *N. Y. & Erie R. R. Co. vs. Young*, 33 Penn. St. 180 ; *Hortoman vs. Lex. & Cov. R. R. Co.*, 18 Mon. 218 ; *Arnold vs. Hudson River Ry Co.*, 49 Barb. 108 ; *Cleveland & Pittsburg R. R. vs. Speer*, 56 Penn. St. 325 ; *Williams vs. N. Y. Cent. R. R. Co.*, 16 N. Y. 103 ; *Crawford vs. Delawne*, 7 Ohio St. 459 ; *Cincinnati vs. Spring Grove Av. Ry Co.*, 14 Ohio St. 523.)

And the damages for which plaintiff was entitled to recover were such personal inconveniences suffered by him in his business or in his access to his property, not suffered by the public at large. (*Ang. Highw. § 285* ; *Lackland vs. N. Mo. R. R.*, 34 Mo. 267 ; *Brainard vs. Conn. River R. R.*, 7 Cush. 506 ; *Stetson vs. Faxon*, 19 Pick. 147 ; *Proprietors Quincy Canal vs. Newcomb*, 7 Mete. 276 ; *Smith vs. Rector*, 7 Cush. 254 ; *Hughes vs. Prov. & Wor. R. R.*, 2 R. L. 493 ; *Radcliffe, Ex'rs, vs. Mayor of Brooklyn*, 4 Comst. 207.)

McCann & Rutherford, for Respondent, cited : *Williams vs. Natural Bridge Plank Road Co.*, 21 Mo. 581 ; *Lackland vs. N. Mo. R. R. Co.*, 31 Mo. 180 ; *Lackland, Adm'r, vs. N. Mo. R. R. Co.*, 34 Mo. 259 ; *Thurston vs. City of St. Joseph*, 51 Mo. 510.)

NORTON, Judge, delivered the opinion of the court.

This suit was instituted to recover damages for injury to four lots owned by plaintiff abutting on Moulton street, in the town of Moberly. The petition alleges that defendant in the construction of its road on said street erected an embankment from three to seven feet high in front of said lots, and allowed its cars,

coaches and trains to stand on its track, whereby the use of said street was destroyed and ingress and egress to plaintiff's lots prevented. The allegations of the petition are denied by answer. The case was submitted to a jury and a verdict was found for plaintiff upon which judgment was rendered and from which defendant appeals.

It is urged by the defendant that during the progress of the trial the court admitted improper and illegal evidence against his objection, and also that the court erred in giving the instructions asked for by the plaintiff, and in refusing six instructions which were asked for by defendant. These are the only points presented in the record. During the trial the court allowed witnesses, after a proper examination touching their knowledge of the subjects, to testify as to the market value of the lots, both before and after the obstruction placed in the street in front of them. It is insisted that this evidence should not have been admitted because it was the mere expression of an opinion of the witness.

The general doctrine is that a witness should not be allowed to give his opinion, but should be confined to the statement of facts, leaving the conclusion to be arrived at to the jury. This rule however is not of universal application. In questions involving the value of property the opinion of witnesses may be received, and in such cases there is an exception to the general rule. Witnesses familiar with the value of property are permitted to state their opinion as to its value. (Sedg. on Dam. 752; Thomas vs. Mallenkrodt, 43 Mo. 58; Lay vs. Hopkins 5 Denio, 84; Robertson vs. Knapp, 35 N. Y. 91; Clark vs. Baird, 5 Seld. 183.)

The objection of the defendant to the evidence admitted was therefore properly overruled.

The following instructions were given for plaintiff:

1. If defendant constructed its railroad on the street in front of plaintiff's lots, by making an embankment or grade along the line of the street, and placed thereon cross-ties and track for its road, and uses the same for switch or side track purposes by standing thereon cars or trains of cars, and thereby has unreasonably and materially obstructed the use of said street, or has ma-

terially obstructed the way to and from said lots so as to lessen the value of plaintiff's lots, the jury will find for plaintiff.

2. If the defendant located and constructed its railroad in the street in front of plaintiff's lots by making its road-bed and grade, and placing thereon cross-ties and track for its road, above the grade or level of said street, or uses the same for switch or side track purposes, by standing cars thereon not in other use, and has thereby unnecessarily impaired the usefulness of said street, or has failed to restore said street to its former condition of usefulness, so that the lots of plaintiff, as a consequence, are injured in value, the jury will find for plaintiff.

3. The measure of damages is the reduction in the market value of said lots caused by such use and location of defendant's railroad in said street: said damages not to exceed the sum sued for in plaintiff's petition.

4. Although the jury may believe from the evidence that the Tebo & Neosho Railroad Company built the road and embankment in Moulton street, opposite the plaintiff's lots, if they further believe that said railroad and embankment were so built as to obstruct the free use of said Moulton street, and thereby did damage the plaintiff's lots, and that said railroad has been put into defendant's possession by said Tebo & Neosho Railroad Company, with full power and authority to continue said obstruction by the use and operation of said railroad in said street, and that defendant has since continued said obstruction by the use and operation of said railroad in said street, then the jury are instructed that defendant is equally liable for the same.

It is objected that there was no evidence on which to base the first instruction. This objection is not well founded, because the evidence showed that the resolution of the board of trustees conferred upon defendant the right of way and privilege to build and operate its road along said street, and that from the time of its completion it was in the possession of defendant and has ever since been operated by him.

It is further objected that the word "value," as used in the first and second instructions, and the words "market value," as used in the third, render them inconsistent. This objection is frivol-

ous. The words "market value" in the third instruction being explanatory of the word "value" as used in the first and second.

The third instruction is objected to because it is contended, that under it the jury could consider damages which might have resulted from the ordinary use of the street by defendant, as a railway, in the carrying on of its business. If the instruction were susceptible of this interpretation it should not have been given, but we do not think it admits of such a construction. The jury are told in it that the measure of damages is the reduction in the market value of the lots caused by "such use and location," which words refer to the use and location described in the two preceding instructions. If this were not clearly so, the eighth instruction, given for defendant, would so qualify it as to relieve the second instruction from the objection made to it. The three instructions given may well rest on the authority of *Lackland vs. North Mo. R. R. Co.*, 31 Mo. 180.

The evidence in the case tended to show that the embankment in Moulton street was built by the Tebo & Neosho road, and that on the completion of the road it was put in the possession and under the control of defendant, and has ever since been operated by him.

The fourth instruction directs the jury that if the embankment was built by the Tebo & Neosho road, so as to obstruct the free use of the street, and that the same was put into defendant's possession with power and authority to continue the same, the defendant was equally liable with the Tebo & Neosho road.

It has been held that when one person erects a nuisance and places it in the possession and under the control of another, and it is by him continued, each is liable to answer in damages for an injury resulting therefrom. (*Staple vs. Spring*, 10 Mass. 77; *Moon vs. Dame Brown*, 3 Dyer, 320; *Bonwell vs. Prior*, 2 Salk. 460--4.)

The fourth instruction was based on the above principle and was therefore properly given.

The first, third, fourth and fifth instructions, asked for by defendant, asserted the law to be directly opposite to the above

view, and were therefore properly refused. The second and sixth instructions for defendant, which were refused by the court, and the seventh, eighth, ninth, tenth and eleventh, which were given, are as follows:

2. In ascertaining the damages which may have been done plaintiff, by reason of defendant permitting cars, coaches, or engines to remain standing upon the track built in front of his lots, the jury will take into consideration the fact that the defendant has and had a right to use said track as a means of travel and transportation, and use for its trains and engines, and it is liable to damages only for a negligent or improper use of said track by defendant; and the damages, if any, to be ascertained, are only such as result from an improper use of said track or a use thereof not necessary to the proper conduct and management of defendant's business upon said track.

6. The jury are instructed that the Tebo & Neosho Railroad Company had a right, under their charter, to build and construct a railroad over and upon said Moulton street and in front of plaintiff's lots, and had a right to permit the defendant to operate the same, and in no event can either of said railroad companies be held liable for any damages occasioned plaintiff by the construction and building of said railroad over said street, or for permitting said railroad and embankments or obstructions to remain thereon, except so far as the obstructions or embankments prevent the plaintiff from using said street on which the track is laid, when not in the actual use of defendant; and the jury will not take into consideration any damages which may have been done the plaintiff by reason of the taking and using of said street for the purpose of a railroad, as a means of travel and transportation, and the running or standing of coaches, cars or engines thereon by defendant, so far as was necessary for the proper conduct of its business, but only such damages as may have been done plaintiff by reason of said track being improperly built or constructed and used.

7. The court instructs the jury that they will not take into consideration any damages caused after the filing of the petition in

this cause by reason of the allegations and charges made by plaintiff.

8. The damage which the plaintiff is entitled to recover in this action, on account of the standing of coaches, cars or engines upon the track in front of said lots, must be confined to such damages as have been occasioned him by the negligence or improper use of said track by defendant, and not such as may have resulted from the ordinary use thereof by defendant as a railway in the necessary carrying on of its business operations.

9. The defendant had a right to run its cars and engines over said road in front of plaintiff's lots, and in the operation of its business upon said road to stand cars in front of plaintiff's lots, provided the same was done in the ordinary and necessary use of the said road in its business thereon, and not so as to create a nuisance in front of said lots.

10. In determining whether other causes beside the standing of defendant's cars on said road in front of plaintiff's lot helped to depreciate the same, the jury will take into consideration all the facts given in evidence, the location and character of the ground, its nearness to the St. Louis, Kansas City and Northern Railway, the means of approach to the same, its suitability for business or residence purposes, as well as its relative position with reference to the business parts of the town, and the extension of said business parts of town from said lots, and all the surroundings as given in evidence.

11. Although the jury may believe from the evidence that plaintiff's lots were depreciated in value before the 2d day of August, 1873, yet if the jury further believe from the evidence that other causes beside the standing of defendant's cars on said road in front of said lots, besides the construction thereof, helped to cause said depreciation, then defendant is not liable for the depreciation made by such other causes, but only for such damage as directly results by reason of the acts of defendant.

The giving of the 7th, 8th, 9th, 10th and 11th instructions considered in connection with the 1st and 3rd, which were given for plaintiff, superseded the necessity for giving the second and sixth. They submitted the identical propositions to the jury which were

contained in the instructions which were refused, and the defendant had the benefit of them. Multiplicity of instructions upon the same proposition tends to confuse rather than enlighten.

We think that the instruction given fairly presented the law of the case, and perceiving no error in that respect, nor in the admission of evidence, the judgment is affirmed. Judges Sherwood and Napton concur ; Judge Hough expressing no opinion.

Per NAPTON, Judge, concurring.

It may be considered as settled in this State, as it has previously been in nearly all the other States, that a municipal corporation is not liable for damages indirectly resulting to proprietors of lots within the municipality by the grading of the street or by changes in the grade authorized by the municipality. No private property is in such cases taken for public use, within the meaning of our State constitution, whose language on this topic is mostly copied from the Magna Charta of England. Nor is it probable that any injustice is done, since proprietors of lots have an eye, in their purchases, to this liability of their lots being thrown below or above grade.

It is further determined, that where the charter of the municipality so allows, a railroad may be constructed on a street by permission of the municipal authorities, and neither the municipal corporation nor the railroad company will be responsible for the inconvenience and damage resulting from such construction. (*Porter vs. N. Mo. R. R. Co.*, 33 Mo. 128.) But these principles apply only to a railroad constructed on the grade of the street, where the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road. For those purposes the railroad company must procure sufficient ground, not altogether dedicated to uses entirely inconsistent with the purposes they propose to apply it. (*Lackland vs. N. Mo. R. R. Co.*, 31 Mo. 180.)

These general principles seem to be agreed on. The difficulty in this case is in reconciling these general established principles to the instructions given. It is not to be expected that instruc-

tions given in the hurry of a *nisi prius* trial will not occasionally be subject to criticism. It is only proper for a revising court to see that in the main they are not calculated to mislead.

The instructions in this case seem designed to express the principles applicable to the facts proved on the trial, and although they seem to me somewhat ambiguous, yet the verdict of the jury indicates that they were not misled. I therefore concur in affirming the judgment.

—O—

LUCINDA DOUGHERTY, Respondent, *vs.* GEORGE L. BARNES, Appellant.

1. *Dower—Devise—Renunciation of, must be filed, when.*—Under the statute relating to dower (Wagn. Stat. 541, § 10) where land is devised to the wife by the will, she cannot hold her dower unless her renunciation of the devise be filed within one year after probate.

Appeal from Franklin Circuit Court.

John W. Boottie, for Appellant, cited: see *Aubuchon vs. Lory*, 23 Mo. 99; *Lackland vs. Stephenson*, 54 Mo. 108; *Matney vs. Graham*, 50 Mo. 559.

John R. Martin, for Respondent, cited; *Bretz vs. Matney*, 60 Mo. 444.

NORTON, Judge, delivered the opinion of the court.

This is a suit instituted by plaintiff for the assignment of dower to her in certain lands in Franklin county, to which she claims title as the widow of John W. Dougherty who it is alleged owned the lands in fee at the time of his death.

Defendant in his answer alleges that Dougherty, the husband of plaintiff, died in December, 1863, leaving a will containing a devise to plaintiff of all his real and personal estate during her widowhood, charged with the duty of raising and educating the children of the said John W. out of the profits of the same;

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that said will was duly admitted to probate and letters testamentary were granted to one Sweet, who in 1867, under an order of the county court, sold the land, (in which dower is claimed) for the payment of debts, to defendant for the sum of \$2,214, which sale was approved by the court and a deed made by said administrator to defendant in 1868. It is further alleged that plaintiff received the entire profits of said land from the death of her husband till said sale, and that there was in the hands of the administrator, after payment of debts, a sum of money, the yearly value of which exceeds the one-third of the yearly value of said land.

It is further alleged that the plaintiff did not file her written or any other renunciation of the provisions of the will as provided by the statute within twelve months, or any other time after probate of the same, but that she accepted the provisions of the will by enjoying the rents and profits of the land till it was sold and receiving, after it was sold, part or the whole of the proceeds of the sale remaining after the payment of debts.

Plaintiff admits in the replication that she did not elect not to take under the provisions of the will, and alleges that at no time prior to the sale of said land did she know, or could she have known, the value of the estate devised; and denies that any portion of the proceeds of the sale of said lands was paid to her in lieu of her dower.

There was a trial and decree by the court for plaintiff, from which defendant appeals.

The evidence in the case tends strongly to show that plaintiff was acquainted with the provisions of the will at the time it was made, that she was informed by the executor of his intention to sell the lands before they were sold, and that after the sale to defendant she was informed of it fully, and requested the administrator to lay out the proceeds of the sale for her, in lands in Johnson county. It further shows that plaintiff occupied the land for one year, and rented it and received the proceeds for two or three years, and up to the time defendant went into possession under his purchase; that after the sale the executor paid plaintiff a portion of the proceeds of the sale and that plaintiff executed one re-

ceipt in 1870 for \$84, and another in December 1871 for \$50, four months before this suit was brought, in which she acknowledged to have received the respective amounts under the will of her husband. The final settlement of the executor was also in evidence, showing in his hands a balance of \$1,421.

The question presented under the above facts, with the fact admitted in the pleading that plaintiff did not file a written renunciation of the devise in the will as required by law, is, can dower be assigned to plaintiff in the lands sold by the executor to defendant?

Under our statute, §§ 15 and 16, (Wagn. Stat. 541) the devise in the will of plaintiff's husband of all his real and personal estate during widowhood, is to be considered as a devise in lieu of dower, it not being otherwise expressed in the will, and she cannot be endowed in the real estate in question unless she has within twelve months filed a written renunciation of the provisions of the will as is therein required. If this written refusal to accept the provisions of the will is not filed within twelve months after probate of the will by the wife, the law presumes her to have acquiesced. At any time within the year she may reject the provisions of the will, and the law has justly and wisely given her that length of time within which to inform herself as to the condition of the estate, and to determine the question as to whether or not it is to her interest to accept the provision made, or to reject it and be endowed under the other provisions of the statute.

While the statute by fixing the time at twelve months from probate of will does not precipitate or require a hurried decision, it was evidently the purpose of the legislature to prescribe a limit to its exercise, and not to grant an indefinite period during which purchasers and creditors could acquire rights as sacred and just as the wife's, and which it would be inequitable to disturb. This view is sustained, when considered in connection with the fact that the writing is required to be signed and acknowledged, as in case of deeds for land, and filed in the office of the court in which the will is proved and recorded. The evident object of this is to protect creditors and purchasers by enabling them to inspect the

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instrument if it is filed, and if no such instrument is on file they can well act on the presumption that the provisions of the will have been accepted. The plaintiff cannot take both under the law and under the will, and in the absence of proof of fraud, chicanery or contrivance to induce plaintiff to acquiesce in the provisions of the will, or to refuse to accept its provisions, this court cannot interfere and allow that to be done in eight years which the statute required to be done in one. (Lackland, Adm'r, vs. Stevenson, 54 Mo. 110; Bretz vs. Matney, Ex'r, 60 Mo. 444; Aubuchon vs. Lory, 24 Mo. 99.)

We think the court erred in refusing the instructions of defendant, asked upon the above theory, and in rendering a decree for plaintiff, assigning dower.

Judgment reversed, and cause remanded in which the other judges concur.

—o—

SARAH GANT, Plaintiff in Error, vs. ELIZABETH HENLY, Defendant in Error.

1. *Dower—Devise in lieu of—Renunciation of devise must be filed, when.*—The term "pass" as used in § 16 of the Dower Act (Wagn. Stat. p. 541) means "devise," and under the statute law of Missouri, (see §§ 15, 16) after due notice of her devise, the renunciation thereof by the widow, in order to avail in holding her dower, must be filed within twelve months from proof of the will and not later. (See Price vs. Wood, 43 Mo. 247; Ewing vs. Ewing, 44 Mo. 23; Dougherty vs. Barnes, ante, p. 159.)

Error to Jackson County Circuit Court.

A. Comingo, for Plaintiff in Error, cited: Adsit vs. Adsit, 2 Johns. Ch. 448; Church vs. Bull, 2 Den. 430; Havens vs. Sackett, 15 N. Y. 372; Leonard vs. Steele, 4 Barb. 20, 22; Brown vs. Caldwell, 1 Spear Eq. 322, 325; U. S. vs. Duncan, 4 McLean 99; Thompson vs. Egbert, 2 Harr. (N. J. L.) 459; Gough vs. Manning, 26 Md. 347; Thompson vs. McGaw, 1 Metc. 66; Hastings vs. Clifford, 32 Me. 132; Chew vs. Far-

mer's Bank, 9 Gill. (Md.) 361; Gist vs. Cattell, 2 Dessaus, (S. C.) 53; Snelgrove vs. Snelgrove, 4 Id. 274; Wagn. Stat. 541, § 17; 1 Hill. Real Pr. 105; Vernon's case 4 Coke's R. 4.

Wm. Chrisman, for Defendant in Error, cited: Pratt vs. Patton, 5 Cush. 174; 1 Greenl. Cr. pp. 215, 216; Logan vs. Phillips, 18 Mo. 26; Halbert vs. Halbert, 19 Mo. 453; Thompson vs. McGaw *et al.*, 1 Met. (Mass.) 73; Price vs. Wood, 43 Mo. 247; Ewing vs. Ewing, 44 Mo. 24.

SHERWOOD, Judge, delivered the opinion of the court.

Under our statute, (Wagn. Stat., §§ 15, 16 p. 541) if real estate be devised to the wife by the husband, such devise will bar dower unless the testator in his will otherwise declare, or unless within the time and in the manner pointed out, she renounce the provisions of the will. The tenth section of the Dower Act has already received judicial construction, and it has been held that the election allowed thereby must be made in twelve months or not at all. (Price vs. Wood, 43 Mo. 247; Ewing vs. Ewing, 44 Mo. 23.) And that section is, in respect to time and mode, substantially similar to section sixteen, *supra*. And no good reason is therefore seen why a like rule should not prevail in this case also, where the widow, although duly notified by the executor, failed to file her renunciation within the period designated by law.

And the complexion of the case is not altered because unexpected debts had to be allowed against the estate, in consequence whereof the realty devised had to be sold for their payment. It seems that in other states, provision is made by statute for cases of this sort, and the case cited and relied on by the plaintiffs (Thompson vs. McGaw, 1 Met. 66), shows that under the laws of Massachusetts, "if a woman is deprived of the provision made for her by will or otherwise in lieu of dower, she may be endowed anew, in like manner as if such provision had not been made." But it shall suffice to say that our law contains no such clause. The meaning of the words of section fifteen, "if any testator shall by will pass any real estate," etc., are too plain

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for argument; the term "pass" can only mean "devise." Our views on this subject are elsewhere expressed more at length. (Dougherty vs. Barnes, *ante*, p. 159.)

Judgment affirmed. All the other judges concur.

—O—

J. M. BERRY, Appellant, vs. ROBERT WILSON, Respondent.

1. *Replevin—Instructions—Ownership—Burden of Proof—Preponderance of evidence.*—In replevin an instruction that unless the jury believe that defendant is the owner they will find for plaintiff, is error.

In such suit a further instruction that, unless the jury are satisfied "from a preponderance of evidence" that plaintiff is the owner, they will find for defendant, is not such error as will warrant a reversal. (See Clarke vs. Kitchen, 52 Mo. 316.)

Appeal from Jasper County Common Pleas Court.

Harden & Buler, for Appellant.

W. H. Phelps, for Respondent.

HOUGH, Judge, delivered the opinion of the court.

This was an action of replevin for a steer, of which each party claimed to be the owner. The testimony was conflicting. At the instance of plaintiff, the court gave the following instruction: "Unless the jury believe from the evidence that defendant is the owner of the steer in controversy they will find for the plaintiff, and assess his damages at whatever sum the evidence shows he was damaged, not exceeding three dollars." For the defendant the court gave the following: The court instructs the jury that the burden of proof is upon the plaintiff, and unless he satisfies the jury by a preponderance of testimony that he is the owner of the steer in controversy, you will find the issue for the defendant.

There was a verdict and judgment for the defendant from which the plaintiff has appealed.

These two instructions presented the case to the jury very favorably for the plaintiff. The first instruction errs in his favor.

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The strictures made by counsel upon the use of the word "preponderance" in the second, are perhaps justified by the remarks made in the case of *Clark vs. Kitchen* (52 Mo. 316). Yet it was not thought in that case, nor has it ever been held by this court, that the use of that word in an instruction, in the connection in which it now appears, would warrant a reversal of the judgment.

The only error committed was in favor of the plaintiff. The other judges concurring the judgment will be affirmed.

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JACOB D. WRIGHT, Respondent, *vs.* THE TOWN OF BUTLER, Appellant.

1. *Street openings—Damages, assessment of by commissioner—Appeal from to circuit court—Title of plaintiff—Evidence to defeat.*—Where the report of a board of commissioners to assess damages and benefits for the opening of a street, finds that A. is owner of the land condemned, and the report is approved by the town board of trustees; and from the assessment of damages and the report he appeals to the circuit court, the municipality cannot on the trial in that court introduce evidence to prove that A. was not the owner.

Appeal from Bates Circuit Court.

A. T. Holcomb, with John T. Smith, Jr., for Appellant, cited: *Dil. Mun. Corp.*, § 475; *Cheatham vs. Brainard*, 11 Conn. 81; *Turley vs. Tucker*, 6 Mo. 301; *Kempton vs. Cook*, 4 Pick. 305; *Goodwin vs. Hubbard*, 15 Mass. 210; *Truss vs. Old*, 6 Rand. [Va.] 556.

Christian & Forbes, for Respondent.

NORTON, Judge, delivered the opinion of the court.

The town of Butler, in April, 1873, by its board of trustees, appointed three commissioners to assess damages done to real estate in opening Fulton street in said town. The commissioners thus appointed made their report to the board, in which Jacob D. Wright was found to be the owner of block 17 in said town, and assessed his damages at one dollar and the benefits of said street

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to him at one dollar. This report was approved by the board and the land condemned, or so much as was for the use of said street. From the action of the board the said Wright appealed to the circuit court, where, upon a trial, Wright obtained verdict and judgment for \$40 damages, from which the said town of Butler has appealed to this court.

On the trial the town of Butler offered in evidence the records of title deeds tending to show that the title to block 17 was in the heirs of one Allen Herald, and not in plaintiff, and also parol evidence to show the said heirs claimed the property.

The refusal by the court to admit this evidence is the only error complained of, and it is insisted by counsel that it was competent for defendant to prove that Wright was not the owner of the block in question.

The authorities to which we have been cited relate to actions of trespass and ejectment, and we need not have been referred to them to establish the proposition, that in such actions both the possession and title of plaintiff may be questioned, provided the answer of the defendant denied either. To make either possession or title triable questions, they must be put in issue by the pleadings, and when the answer not only fails to deny these facts, but expressly admits them, they become indisputable on the trial, and defendant will not be allowed to make proof against his own admission.

The case at bar is in the latter condition. It is true there is neither petition nor answer in the case, nor was either required in a proceeding of this character. It is founded on the action of the board of trustees of the town of Butler in receiving the report of three commissioners appointed by them to assess damages to lot owners who might be damaged by the opening of a certain street in said town. The report stated that Wright was the owner of block 17, through or by which said street was to be opened, and that the advantages or benefits he would derive equaled the damage he would sustain. This report was approved by the board and the land condemned for the use of the street, and from this action Wright appealed, claiming that he was damaged more than he was benefited. The title of Wright thus

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stood admitted to block 17, as much so as if he had filed his petition in the circuit court claiming title and possession, and defendant had answered and admitted his allegations as to title and possession.

We think the action of the court in excluding the evidence offered was rightful, and the judgment is hereby affirmed. The other judges concur.

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STATE *ex rel.* JAS. S. BROWN, Adm'r, Defendant in Error, *vs.*
PETER S. BAKER, Adm'r, *et al.*, Plaintiffs in Error.

1. *Bond—Surety—Signature of on faith of that of co-surety which proves to be forged.*—A surety upon a bond will not be discharged from liability by the fact that the name of a co-surety, on the faith of which his signature has been procured, was a forgery, nor by the fact that the surety whose name was forged gave him no information of the fact, where the condition upon which the surety signed is unknown to the officer to whom the bond is given, at the time he accepts the same. (State to use, etc. *vs.* Potter, 63 Mo. 212.)

Error to Johnson Circuit Court.

C. E. Moorman, for Plaintiffs in Error, cited: Moore *vs.* Sandusky, 46 Mo. 377 380; Seeley *vs.* The People, 2 Am. Law Reg. 344, N. S.; Bagot *vs.* State *ex rel.* Dennison, 33 Ind. 262; Pepper *vs.* State *ex rel.* Harvey, 22 Ind. 399-410, and authorities cited; The People *vs.* Bostwick, 32 N. Y. 445-447; Ayres *vs.* Milroy, 53 Mo. 516, *et seq.*; Whitmore *vs.* Obear, 54 Mo. 280, *et seq.*; Martin *vs.* Smylee, 55 Mo. 377; Briggs *vs.* Ewart, 51 Mo. 245; Cutter *vs.* Whittemore, 10 Mass. 443; Linn Co. *vs.* Farris, 52 Mo. 75; Gasconade Co. *vs.* Sanders, 49 Mo. 192; Corby, Ex'r, *vs.* Weddle, 57 Mo. 452; and contended that the facts in State to use *vs.* Potter (63 Mo. 212), differed materially from those in the case at bar.

Crittenden & Cockrell, for Defendant in Error.

SHERWOOD, Judge delivered the opinion of the court.

It is not necessary to review the action of the court in refusing to set aside the judgment by default, since we do not regard the matter which the affidavits contain as constituting any defense.

 Weiland v. Weyland.

The fact that the name of Milly A. McFarland, one of the apparent sureties on the administration bond was forged, or that when informed of such forgery by the administrator, the principal in the bond, after the acceptance of the bond by the proper officer, she did not inform those who had really signed the bond as sureties, of the forgery, cannot affect their previously incurred liability, or distinguish this case, in point of principle, from that of the State vs. Potter (63 Mo. 212); since, in this case, as in that, the bond was complete, and the condition upon which the sureties signed, unknown to the officers, and equally broken; in the former case by failing to obtain the signature of a certain person as co-surety; in the latter by a like failure coupled with the forgery of the name of the promised person.

We are unable, therefore, to make any substantial distinction between the two cases, and shall affirm the judgment. The other judges concur.

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ANN M. WEILAND, Respondent, vs. LEWIS WEYLAND, Appellant.

1. *Witness act*—*Suit by executor on note made to testator*—*Written discharge by*—*Testimony of defendant as to*—*Paper inadmissible, when*—*Refusal of instructions*.—Where suit is brought by an executor on a promissory note given to the testator, defendant is incompetent to testify as to the execution of a paper made by the testator discharging defendant from his obligation, or as to any facts connected with the transaction. (Wagn. Stat., 1872-3. § 1.) Without proof of its execution the paper is not admissible in evidence. And instructions predicated on such instrument are properly refused.
2. *Instructions*—*Evidence*.—Instructions not based on evidence should be refused.

Appeal from Cooper County Circuit Court.

John Cosgrove, for Appellant.

Draffin & Williams, for Respondent, cited: Stanton vs. Ryan, 41 Mo. 510; Johnson vs. Quarles, 46 Mo. 423; Poe vs. Domic, 54 Mo. 119; Kellogg vs. Malin, 62 Mo. 429; Maupin vs. Triplett, 5 Mo. 422.

Weiland v. Weyland.

NORTON, Judge, delivered the opinion of the court.

This suit is founded on a promissory note executed by defendants to the testator of plaintiff for the payment of four hundred dollars. The defendant in his answer admits the execution of the note, and sets up as a defense that William Weiland, to whom the note was executed, made the defendant an absolute gift of the debt and money evidenced by said note, and that the gift was made in writing, and was intended as a receipt in full of said debt and interest. The allegations of the answer were denied by replication, and on a trial by the court without the intervention of a jury, judgment was rendered for plaintiff for the amount of said note and interest, from which defendant has appealed.

The record shows that during the progress of the trial, defendant offered in evidence a paper written in the German language, and which, by agreement of counsel, was translated, which is as follows :

BOONEVILLE, June 15, 1871.

L. WEYLAND,

I herewith notify you that I intend to make some improvements, as my income is small and slow, I am obliged to ask you for the return of a few hundred dollars. I did not intend to trouble you, but I learn you have sold some property for which you will get the money, it will therefore, not be hard for you to comply with my wishes. The note for four hundred dollars can remain yours, but what is over I shall be obliged to have, because we are unable to do any more work and need money everywhere.

W. WEILAND.

Defendant was sworn as a witness and asked to state if the paper offered in evidence was delivered to him, and if so, by whom, and if he knew in whose handwriting the same was, and whether he ever executed to William Weyland any note for \$400 besides the note in suit. This evidence was objected to on the ground that defendant was not a competent witness to prove the facts sought to be proven, because the said William Weyland, the party to the transaction, was dead. This objection was sustained by the court, to which defendants excepted. The

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determination of the question whether the court erred in refusing to allow defendant to testify, will be decisive of this case.

It is well settled that before an instrument of writing like the one offered can be received in evidence, its execution must first be proved and the rejection of the evidence offered to prove its execution is equivalent to the rejection of the paper writing itself.

It is provided in Wagn. Stat., (1873, § 1), that "where an executor or administrator is a party, the other party shall not be allowed to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator."

The language of the act is clear and explicit, and the repeated construction it has received in the following cases fully sustains the trial court in rejecting the evidence offered. (Kellogg vs. Malin, 62 Mo. 429; Poe vs. Domic, 54 Mo. 124; Johnson vs. Quarles, 46 Mo. 423; Stanton vs. Ryan, 41 Mo. 510.) The five declarations of law asked by the defendant and refused by the court were properly refused, because by the exclusion of defendant as a witness, and the failure to establish by other evidence the execution of the writing herein set forth, there was no evidence on which any of the instructions which were refused could be founded.

Judgment affirmed; the other judges concurring.

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STATE OF MISSOURI *ex rel.* SARAH E. HOPKINS, Relator, *vs.*
THE COUNTY COURT OF COOPER COUNTY, *et al.*, Respondents.

1. *Mandamus*—Application for to Supreme Court, will be refused, when.—Except in cases of far more than ordinary magnitude and importance, applications for writs of mandamus, made in the first instance to the Supreme Court, will be refused.

Petition for Mandamus.

Wash Adams, Draffin & Williams, and Wagner, Dyer & Emmons, for Relator.

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J. H. Johnston, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This is an application for a writ of mandamus to compel the county court of Cooper county to pay the interest coupons due July 1, 1873, on certain township bonds issued to the Tebo and Neosho railroad company by said court on behalf of the township of Boonville. In conformity with our long established custom, when the application was first made we denied the writ; but at the earnest solicitation of counsel, one of whom was Chief Justice of this court when said denial occurred, we temporarily vacated the order denying the writ, to give opportunity to the present counsel to be heard in connection with others in cases set down for re-argument, involving the validity of bonds of the character before mentioned; stating, however, that the only effect of the vacation of the order would be to place the petitioner in the same attitude as when the application was first made.

The reasons which gave origin to the custom above adverted to, were these:

That parties in ordinary cases were not compelled to come to this court in search of such extraordinary remedies; that the trial courts were open to them; that suitors who have by appeal or writ of error brought up their causes to this court and had them docketed, were of right entitled to precedence, whereof they should not be deprived in order to give place to those whose causes of action have but recently accrued, and who, if their application for these unusual writs and remedies were successful, would thereby gain an advantage and priority in point of time on the docket, which they could never hope to attain by the usual course of procedure.

These considerations have, in the crowded state of our docket, hitherto prevailed with us, and will continue to do so, until a case of far more than ordinary magnitude and importance, induces a departure from our general rule.

Without any examination, therefore, into the merits of this application we shall deny the writ. Judge Napton absent; the other judges concur.

ERNST. KRECH, Respondent, *vs.* PACIFIC RAILROAD, Appellant.

1. *Practice, civil—Pleading—Evidence—Contract with R. R. Co. for meals furnished employees.*—In suit against a railroad company for board furnished the employees under an alleged contract with the company, it was held proper to show a like arrangement made with prior parties, the evidence being supplemented by proof of an agreement to continue the arrangement with plaintiff, and in the absence of an affidavit showing that defendant was misled thereby, it was held that under the statute plaintiff might amend his petition by designating the price per meal agreed on for each employee.
2. *Instructions—When properly given.*—Instructions which, taken in connection, correctly present the law of the case, are properly given.
3. *Instructions, when properly refused.*—Instructions not founded on the evidence nor having any application to the case, are properly refused.

Appeal from Franklin County Circuit Court.

D. R. O'Neil, for Respondent.

Ewing, Smith & Pope, for Appellant.

NORTON, Judge, delivered the opinion of the court.

This was a suit instituted in the circuit court of Franklin county to recover for the boarding and lodging of the employees of defendant. The petition in substance alleges that defendant contracted with plaintiff to furnish board and lodging to its employees, whenever required by them, at a stipulated price of twenty-five cents per meal; that defendant agreed to deduct from the time pay rolls of each and every employee, to whom boarding and lodging were furnished, the amount of money due plaintiff, and pay the same over to him; that plaintiff at the request of defendant did board his servants from 1870 to February 1872, which amounted in the aggregate to the sum of \$442.65, the particulars of which are set out in an account attached to the petition as part of it; that neither the defendant nor the employees had paid said amounts, and by the failure of defendant to deduct the same from the pay rolls of such employees, and pay them over to plaintiff, the defendant was liable to him in the sum of \$442.65.

The answer of defendant denied all the material allegations of the petition, and upon a trial of the cause judgment was rendered for plaintiff. During the progress of the trial exceptions were

taken to the action of the court in admitting evidence, in allowing an amendment to the petition, and in giving and refusing instructions.

The plaintiff testified that when trains commenced running on defendant's road, 18 or 19 years ago, to the town of Hermann, he was station agent for defendant at that point, and that the general superintendent and pay master of defendant agreed with one Liemer, who was keeping Liemer's hotel in Hermann, that each employee of the road, who could not pay cash to Liemer for his board, should give an order to the paymaster for the amount due, and authorizing a deduction of the same from the sums due the employee from the company, which orders at the end of each month were to be sent to the assistant superintendent, and by him to be sent to the paymaster to be deducted from the pay of the men, and the amounts deducted to be paid to Liemer. It appeared that Liemer kept the hotel under that arrangement till 1860 when he died, and that the hotel was afterwards kept by Liemer's administrator, Mrs. Liemer, and her brother, in the same way till 1868, when plaintiff rented it and carried on his business with defendant in the same way, defendant paying plaintiff on orders for board at the end of each month.

An objection was made by defendant to the admission of so much of the above evidence as related to the contract with Liemer and other parties, while they were keeping the hotel, on the ground of irrelevancy.

We think that this objection was not well taken. The witness testified without objection that when he rented the hotel, in 1868, he carried on business with defendant in boarding its employees in the same way, or under the same arrangement, as it had been carried on by Liemer and those who had preceded him in the hotel. and it was certainly competent for him to state what that arrangement or agreement was between Liemer and defendant, and that his contract was but a continuance of that.

The objections made to the statement of witness, "that Talmage, superintendent of the road, issued an order that the company would not be responsible to boarding house-keepers on these orders any more after the 1st day of February, 1872," was prop-

erly overruled, as it does not appear from the record that the order was a written order, and we will not presume that it was to give foundation to an objection, which, to say the least, was but technical.

During the trial, the court, against the objection of defendant, allowed plaintiff to amend his petition by interlining the words "at 25 cents per meal for each employee."

Under the statute the court, in furtherance of justice and on proper terms, may at any time before final judgment authorize an amendment to be made by inserting other allegations material to the case. In the absence of an affidavit alleging that defendant was misled or surprised by the amendment, the action of the court below in allowing it to be made will be sustained. (*Turner et al. vs. Chillicothe Des Moines R. R. Co., et al., 51 Mo. 501; Fischer vs. Max, 49 Mo. 404.*)

Exceptions were also taken to the first and second instructions given for plaintiff. The jury were told in the first instruction in substance, that before they could return a verdict for plaintiff they must find that by agreement with defendant he boarded the employees of defendant, and that defendant agreed to deduct, on proper order from the pay rolls of its employees each month, the amount due for board, and pay the same to plaintiff; and that defendant had failed to make such deduction and payments.

The second instruction in substance was that if the jury believed that plaintiff, at defendant's request, boarded its employees, and that in consideration thereof defendant agreed to deduct from the pay rolls of such employees the amount of the orders drawn, and that such orders at the end of each month were sent to the proper office of defendant, and that by his negligence such deductions were not made and the plaintiff not paid, they would find for plaintiff.

We find no error in giving these instructions, but think that they, in connection with the second, third and tenth instructions given for defendant, placed the law of the case fairly before the jury.

The instructions numbered 1, 5, 7 and 8, asked for by defendant, sought from the court various declarations of law as to what was a custom or usage of trade and what proof was required to

establish such custom. According to the view we entertain of this case they were properly refused. The action of plaintiff was founded on contract set out in the petition, and in the instructions given for defendant the jury were in express terms directed to find for the defendant, unless it appeared from the evidence that defendant contracted with plaintiff to pay the board of its employees.

The sixth instruction was rightly refused because it sought a declaration of law which had no application to the case. It asked the court to declare that the orders drawn by defendant's employees in plaintiff's favor for board, created no liability on defendant until accepted, when under the contract on which suit was brought a liability was created in the defendant, either by his failure to deduct said orders from the pay rolls, or to pay the same over to plaintiff after they were deducted.

The ninth instruction asked the court to declare that there was no evidence that defendant ever failed to pay any bill for board which had been deducted from the pay of the employees. This was properly refused because defendant was as much liable for a failure to deduct these orders from the pay rolls, as for a failure to pay after the deductions were made; and also, because the witness examined expressly stated that he did not get all the money that had been deducted from the pay rolls, and that when he applied to see them, he was not permitted by defendant to look at them.

The fourth instruction asked the court to tell the jury that the account was not evidence, and that it was excluded from their consideration as such.

The account was not admitted as evidence, nor was it offered as evidence so far as the record shows, and there was consequently no error committed by the court in refusing the instruction.

Judgment affirmed all the other judges concurring except Judge Wagner who is absent.

Norfleet v. Russell, et al.

W. S. NORFLEET, Appellant, vs. A. J. RUSSELL, et al., Respondents.

1. *Evidence—Certificate of acknowledgment of clerk of circuit court—Record copy—Private seal—Omission of.*—Where, as appears from a record copy thereof, the body of a certificate of acknowledgment made by the clerk of a circuit court contains the statement that, there being no seal of the court, the private seal of the clerk is affixed, the presumption arises that the seal was attached thereto, although no written scroll or seal is copied on the record.
2. *Deeds—Covenant of future assurance—After-acquired title.*—Where it distinctly appears on the face of a deed that the intent of the grantor is to convey a fee simple estate, and the instrument contains covenants of future assurance of title, it will convey such as the grantor may afterwards acquire.
3. *Ambiguity, latent will not render deed inadmissible.*—The omission in a deed to designate the county in which land lies will not render the deed inadmissible.
4. *Deed—Acknowledgment—Date of—Subsequent to that of record—Effect of.*—Although the acknowledgment of a deed bear date subsequent to that of the record, notice will nevertheless be imparted from the date of the acknowledgment.
5. *Action—Deed—Suit on subsequent to date of.*—Plaintiff cannot recover on a deed executed after the commencement of his suit.
6. *Land titles—Possession defeated by prior possession with claim after.*—Where plaintiff rests his claim on naked possession, a prior possession in defendant, where the fee is claimed in connection with it, will be sufficient to defeat him.

Appeal from Greene County Circuit Court.

Bray & Cravens, for Appellant, cited : *Stevens vs. Hampton*, 46 Mo. 404 ; *Bishop vs. Schneider*, 46 Mo. 472 ; *Ryan vs. Carr*, 46 Mo. 483 ; *Mastin vs. Halley*, 61 Mo. 196 ; *Chouteau vs. Burlando*, 20 Mo. 482 ; *Geary vs. Kansas City*, 61 Mo. 378 ; *Heddon vs. Overton*, 4 Bibb. 406 ; *Griffin vs. Sheffield*, 38 Miss. 359 ; *Snead vs. Ward*, 5 Dana, 187 ; *Smith vs. Dill*, 13 Cal. 510.

O'Day, Ellis & Kenton, for Respondents.

NORTON, Judge, delivered the opinion of the court.

This is an action by ejectment to recover the possession of parts of lots 17 and 18 in the city of Springfield. The answer of defendants denies specifically the allegations of the petition, and avers that the defendant Kershner, and those under whom he claimed, had been in the actual, open and notorious possession of the lots in suit for ten years prior to the commencement of

the action. The adverse possession of defendant was denied by replication.

On the trial plaintiff offered a large number of deeds in support of his title, and several of them being rejected by the court, plaintiff took a non-suit with leave to move to set the same aside. A motion for that purpose having been filed and overruled, plaintiff appeals to this court.

The only point presented for determination is, as to the action of the court in excluding the record of deeds offered by plaintiff; and to this our attention will be directed. The record shows that the land of which the lots in dispute are a part, was entered by John P. Campbell in 1837.

Plaintiff offered in evidence record of deed of John P. Campbell, to Greene county, dated 1836, conveying to said county fifty acres of land, out of which the lots sued for were carved. This deed was acknowledged before the clerk of the circuit court of Greene county. It was objected to because the record did not show that a seal was attached to the certificates of the clerk taking the acknowledgment. The statement appears on the face of the certificate, that there being no seal of the court, the private seal of the clerk was affixed. Where such statement is made in the body of the certificate the presumption arises that the seal was attached thereto, although no written scroll nor seal appears to be copied in the record. (*Geary vs. Kansas City*, 61 Mo. 378, and cases there cited.)

Nor is there anything in the objection that the deed was executed by Campbell before he acquired title. It distinctly appears on the face of the deed that the intent of the grantor was to convey a fee simple estate, and contained covenants of further assurance of title. (*Bogy vs. Shoab*, 13 Mo. 381.)

The objection made to the record of the following deeds because it did not appear that the seal of the officer, taking the acknowledgment, was copied in the record, viz: deed from B. H. Woodson to W. and S. Norfleet, deed from J. and W. Norfleet, to McQuirter, deed from McQuirter to Woodson, should have been overruled for the reason above given. The record of deed from

Woodson to Jones, as trustee, should have been admitted as evidence. It described the land conveyed as being "seventy feet front off of the east side of lot No. 18, running back sixty-seven feet deep, also twelve feet front off of the west side of lot No. 17, and running back sixty-seven feet and fronting on Olive street, lying and being situated in the city of Springfield, Mo." There is nothing in the objection that it did not further describe the lots as being in Greene county. (*Long vs. Waggoner*, 47 Mo. 179; *Clardy vs. Matthews*, 38 Mo. 121.)

Nor was there anything in the objection to the above deed that it appeared to have been filed on the 27th of July, and was acknowledged and recorded on the 28th of July, the day after it was filed. It would certainly take effect from the 28th, the day it was acknowledged and recorded, and impart notice from that time.

The deed of Patterson, as sheriff and trustee, to plaintiff, having been executed by him after the commencement of the suit, was properly rejected by the court. The suit was instituted on the 18th day of October, 1870, and the deed of Patterson to Norfleet, the plaintiff, was executed in 1873. If plaintiff base his right of recovery on this deed, he cannot maintain it in this suit, as it was brought more than two years before title vested in him, by virtue thereof. (*Collins vs. Bramer*, 1 Mo. 540; *Norcum vs. D'Ench*, 17 Mo. 98; *Buxton vs. Carter*, 11 Mo. 481; *Hall vs. Bell*, 6 Met. 433.)

The bond of McKinney to Apperson, dated in 1849, was properly excluded by the court. It was neither acknowledged, nor was there proof of its execution.

During the trial plaintiff offered evidence tending to show that the lots in controversy had been in his possession, and the possession of the grantors of the deeds received in evidence and then rejected, and under which plaintiff claimed since about 1843. From the light of the record as presented, the defendants appear to rest their claim on naked possession, and in such case, prior possession, when the fee is claimed in connection with it, raises a presumption of title, and is sufficient to eject him who holds

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only by such title. (*Dale et al. vs. Faiver*, 43 Mo. 556, and cases there cited.)

For the errors committed in excluding the record of deeds above referred to, the judgment is reversed and cause remanded. The other judges concur except Judge Wagner, absent.

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WASHINGTON COUNTY TO USE OF SCHOOL FUND OF TOWNSHIP 36,
RANGE 2 EAST, Plaintiff in Error, *vs.* FRANK BOYD, *et al.*,
Defendants in Error.

1. *County court—School lands, purchase of—Injunction against purchaser—Recovery against members of county court on injunction bond—Reimbursement of sum recovered, etc.*—Where prior to the payment of the purchase money for sixteenth section school land, injunction suit is brought in good faith, on behalf of the county, against the purchaser, to stay waste, certain members of the county court executing the injunction bond, those officers will be entitled to reimbursement out of the purchase money, when paid by the vendee of the land into the township fund, for any sum which may have been recovered from them on this bond on dissolution of the injunction. In the bringing of said suit and the execution of such bond, members of the county court act not judicially but ministerially, and as agents of the State for the benefit of the township, and are justified, taking the same measures to protect the property of the State as though it were their own.

And although the money is paid over under order of the county court a majority of which are makers of the bond and distributees of the fund, the issuance of the order is not a judicial proceeding but a purely ministerial act, and at worst merely informal and will not be abrogated unless shown to have been made corruptly.

Error to Washington County Circuit Court.

Philip Pipkin, for Plaintiff in Error.

I. The county court is one of limited jurisdiction, and anything done outside or in excess of the delegated authority is *coram non judice* and void. (*Jefferson Co. vs. Cowan*, 54 Mo. 234; *Schell vs. Leland*, 45 Mo. 289; *Smith vs. Howarth*, 53 Mo. 88; *Miller vs. Seare*, 2 Wm. Blacks. 1145; *Watson vs. Bodell*, 14 Mees. & W. 56; *Houldon vs. Smith*, 14 Q. B. 841; *People vs. Stocking*, 50 Barb. 573; 1 Barnw. & Cr. 169; *Ray Co. vs.*

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Bentley, 49 Mo. 236; Marion Co. vs. Moffett, 15 Mo. 604; Wagn. Stat. 360, §§ 6, 12; id. 884, §§ 30, 31; id. 1269, §§ 85-7; 2 Johns. Cases 49; 1 Stra. 710; 2 Black. 1035; Cowp. 640; 2 Wils. 385; Veal vs. Chariton Co., Ct. 15 Mo. 412; Butler vs. Chariton Co. Ct. 13 Mo. 112.

The petition charges that the county court had no jurisdiction to order an injunction suit to be brought against Martin and others, to stop them from trespassing upon and wasting the timber on said sixteenth section. There is no law authorizing such a proceeding; but on the contrary, ample means were provided by §§ 30, 31, 32, 33, or 34, (Wagn. Stat., 864,) for the recovery of the damages, the prevention of the trespass, etc.

II. Certainly the county court had no authority for taking \$563 out of a fund which the laws, and the courts, have always held to be a sacred, perpetual fund.

III. In this case the two judges Boyd and Johnson—a majority of the court—sat as judges in their own case where they were directly interested. This is forbidden (Wagn. Stat. 441, § 13), and for this reason, if for no other, the action of the court was *coram non jndice* and void, outside of their jurisdiction, and upon the authorities above quoted they are liable.

W. S. Relfe, for Defendants in Error.

It is well settled by the authorities, as well as by statute, that the school funds arising from sales of sixteenth sections are the property of the State, held in trust for the use and benefit of the public schools, and the control thereof delegated to the county courts; and that the people of the townships are the passive recipients of this bounty with no voice as to its control. (Cedar County vs. Johnson, *et al.*, 50 Mo. 226; Township Board of Education vs. Boyd, *et al.*, 58 Mo. 276; Ray Co. vs. Bentley, 49 Mo. 236; Reardon vs. St. Louis Co., 36 Mo. 555.)

Thus the county court has a broad, discretionary, and exclusive control which cannot be interfered with; and so far as the court exercises its judgment and discretion *bona fide* in the case and management of this trust, it is not responsible for results.

In this case the security on Martin's bond had failed, and after repeated notifications they had refused, to give additional security and were working a wholesale destruction of the timber—the the only value the land had. The Martins were reported insolvent, and hence the injunction proceedings. Boyd was one of the sureties on the injunction bond and was compelled to pay it. The court afterward collected \$5,446.06, on the Martin bond, the proceeds of sale, and reimbursed Boyd out of it. Surely he was entitled to be indemnified. There is no distinction between their appropriation and payment of this debt from the proceeds of that sale, and their payments of the officers' fees out of it.

In allowing Boyd's claim out of this fund the court acted judicially, and their action, even if erroneous, cannot be questioned by a suit against them personally. There is no corrupt purpose alleged in the petition, nor could any be inferred from its allegations, but to the contrary. (See *Schottgen vs. Wilson*, 48 Mo. 257, and authorities cited; 1 Denio, 559, cited in *Reed vs. Conway*, 20 Mo. 52, with kindred authorities; also, see *Pike vs. Megoun*, 44 Mo. 491, and 21 Pick. 270, a case in point, cited approvingly in 23 Mo. 529; see 45 Mo. 52 as to what is judicial or otherwise; see generally, 21 Pick. 270; *Marion Co. vs. Moffett*, 15 Mo. 606; *Ray Co. vs. Bently*, 49 Mo. 236; *Tn. Bd. Ed. 36, R. 2 E. vs. Boyd, et al.*, 58 Mo. 276; *Cedar County vs. Johnson*, 50 Mo. 227.)

HENRY, Judge, delivered the opinion of the court.

In November, 1868, and for a long time prior thereto, the defendants were justices of the county court of Washington county. Robert N. and William C. Martin had purchased the sixteenth section of township 36, range 2 east, for which they had with sureties executed their bond to the county for about five thousand dollars; and at the November term, 1868, of said county court, an order was made by said court directing a suit to be instituted in behalf of said county to the use of said township against said Robert N. and William C. Martin and others, to enjoin them from cutting and wasting the timber on said land.

The defendants, Boyd and Johnson, with D. E. Perryman and Harvey S. Hutchinson, in behalf of said county for the benefit of said township, executed the bond required by the statute in such cases, and at the April term of the circuit court of Washington county the injunction was by the court dissolved, and damages assessed against the makers of said bond at five hundred dollars, and judgment rendered against them for that sum and \$63.08 costs, which was paid by defendant Boyd. At the November term, 1870, of said county court, the purchase money for said land, \$5,446.90, having been paid, the court made an order upon the treasurer of said county to pay to said Boyd, out of the purchase money so received, \$563.08 so paid by him on said judgment, and this suit is brought to recover the money so paid to Boyd from the defendants, the members of said county court.

The petition substantially states the foregoing facts, and charges that the order upon the treasurer was wilfully, illegally and knowingly made.

There was a demurrer to the petition, which, being sustained, plaintiff has brought the case here by writ of error.

There is no fraud alleged against the defendant, nor is there any allegation that the suit instituted against the Martins was recklessly undertaken, or that it was productive of no good results to the township for whose benefit it was commenced; and the only question presented by the record for consideration, necessary to notice, is the legality of the action of the court in reimbursing Boyd out of the funds of the township.

The principal proposition discussed in the appellant's brief is, that the county court is a court of limited jurisdiction and anything done in excess of its jurisdiction is *coram non judice* and void.

We may admit the general proposition, but insist that it has no application to this case.

It has been repeatedly held by this court, that there is nothing judicial in the functions exercised by the court in regard to these school lands. (Ray Co. to use, &c. vs. Bently, *et al.*, 49 Mo., 236; Town Board of Education, etc. vs. Boyd, *et al.*, 58

Mo. 279; Cedar Co. vs. Johnson, *et al.*, 50 Mo. 227; Marion Co. vs. Moffet, 15 Mo. 406.)

In the case in 15 Mo. *supra*, Judge Scott said, "The school lands were vested in the State in trust for the benefit of the inhabitants of the township in which they are respectively situated. The State vested in the county court the management of this trust. Those courts are the agents of the State for this purpose." Bliss, J. in Cedar Co. vs. Johnson *et al.* said: The county court, it is true, has the custody of these school funds, yet not for the county, but for the people of these several districts. The court is so far not a county agent, etc."

In 49 Mo. 336, Wagner, Judge, said: "In the management and control of the fund the county court acts purely in an administrative capacity, not as the agent of the county, but in performance of a duty specially devolved upon it by the laws of the State. There is nothing judicial in the exercise of its functions in this respect."

It will be observed that in all these cases the county court is spoken of as an agent. Scott, J. says; "The courts are the agents of the State for this purpose." Bliss, J. says; "The court is so far not a county agent." Wagner, J.: "The court acts not as the agent of the county." It does not act judicially in the management of these school funds, but ministerially, and in the character of an agent for the State.

It is authorized to sell the lands, to lease them, to receive and sue for the purchase money, and if there be danger of loss of a debt contracted for the purchase of these lands, the court, we think, might resort to those extraordinary remedies provided for creditors generally. It might sue by attachment, and, if the purchaser is stripping the land of its timber, and thereby endangering the security for the debt, must the agent of the State stand by and witness this spoliation, and trust to the criminal law to indemnify the township by the fine imposed against persons committing waste on such lands? Five hundred dollars is the extreme penalty, while the timber destroyed might be worth five times that amount. As careful and honest agents they will guard the interests of their principal as if the property were their own, and

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as long as they are actuated by an honest purpose to subserve that interest, to hold that they must answer, out of their own means, for any costs or expenses honestly incurred in the endeavor to protect that interest, would tend far more to jeopardize the funds than to hold them entitled to remuneration for such outlays when they have been judiciously and honestly made.

The Township Board of Education, etc., vs. Boyd, *et al.* (58 Mo. 279) was this identical case in another form. It was a proceeding by mandamus to compel the county court of Washington county, by an order on her treasurer, to reimburse township No. 36, range 2 east, for the money paid to defendant in this case, Boyd. The peremptory writ was refused. Judge Lewis, who delivered the opinion of the court, held the following language pertinent to the question we are considering :

“The county court was a trustee for the ‘care and management’ of the school fund of the township. In this capacity, and in the exercise, for aught that appears to the contrary, of its soundest judgment and discretion, it instituted certain injunction proceedings for the protection of the fund. The law required personal security for the purpose, which was given. A judgment against the surety following, which he was bound to pay and did pay, it would be strange if the law should refuse to indemnify him from the interest which his suretyship had so served at a sacrifice.”

It is urged that two of the defendants, Boyd and Johnson, were a majority of the court and sat as judges in their own case in making the order.

It was not a judicial proceeding but a ministerial act, and if not prompted by corruption, which is not charged, but made in good faith to reimburse Boyd for money judiciously and honestly expended for the benefit of the school fund, it should be replaced.

Admitting that he was entitled to be reimbursed, how else could it have been accomplished? And if the order were irregular, yet if it be admitted that Boyd was entitled to the money, shall it be recovered back in this suit for a mere informality, when he could immediately sue for and recover it from the township with interest and costs?

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The simple question is, has Boyd received money from that fund to which in equity and good conscience he is not entitled?

From the record we think that he was clearly entitled to indemnity for what he had paid out, and the judgment is affirmed with the concurrence of all the court except Judge Sherwood who dissents.

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STATE TO USE OF J. C. GATES, *et al.*, Respondents, *vs.* THOS. FITZPATRICK, *et al.*, Appellants.

1. *Officer—Levy on property of B. on suit against A.—Bond, liability on, etc.*—If on a writ of attachment against A., an officer levies on the property of B. he is guilty of official misconduct for which he and his sureties are liable, at the suit of B. on his official bond; and it would clearly be his duty to return the property to B. although it were taken from the possession of A.
2. *Bailment—Attachment, dissolution of sale of property in hands of bailee, effect of.*—Upon the dissolution of an attachment the officer becomes the bailee for the defendant (if he is the owner) not by contract but by operation of law.
In case of bailment by contract, a transfer by the bailor of the property and the right of possession, operates to transfer not merely the right of possession but the goods themselves, and thereafter the vendor's bailee becomes the bailee of the vendee, and the possession of the bailee is that of the purchaser. (*Williams vs. Gray*, 39 Mo. 205.)
3. *Attachment—Sale of property subject to—On dismissal of suit officer should turn property over to whom—Official bonds, liability on.*—After the dismissal of an attachment it is the duty of the officer at his peril to turn the property over to the true owner, who is *prima facie* the defendant in the attachment. But where pending the attachment, and subject thereto, defendant sells the property and the officer is notified of that fact, he must on dismissal of the suit deliver it to the vendee; and in such case he is not estopped from showing in a suit by the vendor that the latter had parted with his interest, even though the property had been seized while in the vendor's possession. And on the other hand, if after dismissal he return the property to the vendor so that the same is lost to the vendee, he will be liable therefor on his official bond.
4. *Bond—Judgment for amount assessed instead of judgment on penalty—Effect of practice—Supreme Court.*—Judgment for the amount assessed in an action on a bond, instead of judgment for its penalty with special execution for the amount assessed, will operate a reversal on appeal.

Appeal from Jackson County Circuit Court.

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White & Titus, for Appellants.

It is not made the constable's duty by law to inquire into third persons' rights accruing from legal proceedings, wherein such persons are not parties. (See *Armstrong vs. Langdon*, 57 Mo. 353.) The defendant from whom goods are taken is the constable's principal, after the goods are ordered to be returned on dismissal of the action. Even were the law otherwise, he could only be liable for a breach of personal duty, and not upon his official bond in this action, there being no such privity between him and the relators as creates such official liability.

The bill of sale in evidence is invalid and should have been so declared by the court, as by its terms there was no delivery of the goods, actual or constructive, they being in the hands of the law. There was no price agreed on and no money paid. (See *Brown Frauds*, pp. 399, 406; *Pluniman vs. Hartiborn*, 13 Mass. 87; *Bank of Rome vs. Matt*, 17 Wend. 554.)

Karnes & Ess, for Respondents.

A sale of goods in the hands of a bailee, when the bailee is notified of it, is good even under tenth section of the fraudulent conveyance act. Much more will it be good where no creditor is complaining. The attachment was settled and the goods belonged to relators.

HOUGH, Judge, delivered the opinion of the court.

This was a suit upon a constable's bond given by the defendant Fitzpatrick as principal, with his co-defendants herein as sureties.

Under a writ of attachment issued at the suit of the Goodyear Rubber Company, on the 24th day of February, 1873, by a justice of the peace in Jackson county, against one Aaron Mann, a certain stock of boots and shoes, the property of said Mann, was levied upon by the defendant Fitzpatrick, as constable.

On the 27th day of February, 1873, Mann executed a bill of sale by which he sold, assigned and transferred said boots and shoes to the plaintiffs herein, subject to said attachment, in payment of a debt due from him to the plaintiffs.

There was testimony tending to show that Fitzpatrick was informed by the plaintiffs of this bill of sale immediately after its execution.

In March, 1873, the attachment suit against Mann was dismissed, and the defendant Fitzpatrick delivered the property attached to Mann or his agents, whereby it was lost to the plaintiffs: and after an unsuccessful attempt to recover the same from Mann, they instituted the present action to recover from the defendant Fitzpatrick and his sureties, the value of said goods.

There was a verdict and judgment for plaintiffs from which the defendants have appealed to this court.

The defendants contend that it was the legal duty of Fitzpatrick, upon the dissolution of the attachment, to return the goods to Mann and not to his vendees—the plaintiffs herein; and that if plaintiffs have any right of action whatever against said Fitzpatrick, it is against him individually, and not upon his official bond.

Several minor objections are urged to the action of the court below at the trial, but the chief question is whether upon the facts stated the plaintiffs can maintain an action on the official bond of the constable?

The attachment did not alter the estate of Mann in the property levied upon, nor take away his right of alienation, and the plaintiff in the attachment suit acquired no property thereby; it only acquired a lien, and Mann could lawfully transfer the property subject to the lien. That he did in fact so transfer it is not disputed. If, after the dissolution of the attachment, the constable had delivered the property attached to the plaintiffs, we think it quite clear that Mann could not have maintained an action against the constable for his failure to return it to him, as the constable could have shown in defense that he, Mann, had sold and transferred the property and thereby parted with his right to the possession. (Drake Attach. § 294, and authorities cited.)

If this position be correct it necessarily follows that it was not the *absolute legal duty* of Fitzpatrick to return the property to Mann; for if it was, his delivery of it to another person, although such person might be the true owner, could constitute no defense.

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But if it was not his official duty to return the property to Mann, after he had parted with his title and right of possession, does it follow that it was his official duty to deliver the property to Mann's vendee? Or was it simply optional with him whether he would do so or not? The statute does not require that any order shall be made, when an attachment is dissolved, for the return of the property attached to the defendant in the attachment. Upon its dissolution the officer becomes a bailee for the defendant, (if he is the owner,) not by contract, but by operation of law. In case of a bailment by contract a transfer by the bailor of the property and right of possession undoubtedly operates to transfer *not merely a right of action*, but the goods themselves; and thereafter the vendor's bailee becomes the bailee of the vendee; and the possession of the bailee is that of the purchaser. (Williams vs. Evans, 39 Mo. 205.) Is this rule applicable to a case like the present? Where an officer has acquired possession of property by virtue of a writ of attachment which has been vacated or annulled, he continues to hold such property in his official capacity, and is officially responsible for its return to some one. If under a writ of attachment against A., the officer levies upon the property of B., he is guilty of official misconduct for which he and his sureties are liable at the suit of B. upon his official bond. (People vs. Schuyler, 4 Comst. 173; Archer vs. Noble, 3 Greenl. 418; Harris vs. Hanson, 11 Me. 241; Conrack vs. Commonwealth, 5 Binn. 184; Forsyth vs. Ellis, 4 J. J. Marshall, 299; Commonwealth vs. Stockton, 5 Monroe, 192.)

In such case it would clearly be his official duty to return the property to the owner B., although it may have been taken from the possession of A. If the plaintiff's goods had been seized under the writ of attachment against Mann and not returned to them, they could have maintained an action against the constable on his bond. Then why not also when the property has become theirs after the seizure, but before the dissolution of the attachment, the officer being notified of the change of ownership? There would be as much privity between the parties in the one case as in the other.

Let us suppose that the officer should refuse to deliver the property either to the defendant in the attachment or his vendee, of whose claim he had notice, but should deliver it to a third party, whereby it should be lost to both, or should convert it to his own use, would he not be guilty of a breach of official duty? And if so, who could maintain an action for such breach? The defendant in the attachment manifestly could not, for he has no interest in the property and no right to the possession, and we have seen that the officer would not be estopped from showing this although the property may have been taken from him. The only person who could sue would be the owner of the property, the defendant's vendee. He would in such case undoubtedly be injured by the officer's breach of duty, and could, we think, maintain an action on his official bond. There can be no breach of official duty where no official duty exists, and if, therefore, it be the official duty of the constable, in the case supposed, to preserve the property for the vendee, then a delivery of it even to the defendant in the attachment, whereby it was lost, would also be a breach of his official duty.

It is urged by the appellants that it is not the duty of the officer to inquire into and decide upon the rights of third persons, not parties to the suit. And we are referred to the case of the State to the use of Armstrong vs. Langdon, 57 Mo. 353, as sustaining this view. The decision in that case may be upheld upon the particular facts there stated; but the court certainly did not intend to decide in that case that where the property of A. is seized under a writ of attachment against B., the officer would not be liable as such at the suit of A., and that A. would have no remedy but to interplead in the attachment suit. The books abound in cases showing that under such circumstances, replevin, trespass, or an action on the bond of the officer may also be maintained.

In all cases of seizure of personal property, under attachment, the officer is compelled to determine, at his peril, whether the property seized is that of the defendant in the writ. And after it comes to his possession he holds it as an officer for the true owner, whether such owner's right thereto accrued the day before the levy

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of the writ or the day after. In either case, of course, after dissolution of the attachment, it would *prima facie* be his duty to return it to the person from whom it had been taken.

Our statutes provide no indemnity for the sheriff in such cases.

We are of the opinion that the present action was properly brought on the bond of the officer.

The remaining objections are purely technical and so need not be noticed.

The judgment in this case was only for the amount of the damages assessed and not for the penalty of the bond, with special execution as provided by law, and for this reason the judgment will be reversed and the cause remanded with directions to the circuit court to enter up the judgment required by the statute.

The other judges concur.

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STATE OF MISSOURI, Respondent, *vs.* PETER MEYER, Appellant.

1. *Indictment—Venue, failure of evidence to show.*—When the evidence adduced at the trial does not show in what county the offense charged in an indictment was committed, judgment for the State will be reversed and the cause remanded.

Appeal from Barton County Circuit Court.

Wm. H. Phelps, for Appellant.

J. A. Hockaday, Att'y Gen'l, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

The defendant was indicted under § 1, (Wagn. Stat. 247,) for carrying on the business of a dealer in exchange, etc., without license therefor, and on trial had, he was convicted.

For the reason that the evidence adduced at the trial does not show in what county the alleged offense was committed, the judgment must be reversed and the cause remanded.

All the other judges concur.

State v. Mitchell.

STATE OF MISSOURI, Defendant in Error, *vs.* AARON MITCHELL,
Plaintiff in Error.

1. *Criminal law—Murder in first degree—Deliberation and premeditation essential to—Instructions.*—Homicide in order to constitute murder in the first degree under the Statute of Missouri, must be, not only willful and with malice but, with deliberation or premeditation. And these constituents are to be shown like any other facts, by direct proof or by circumstances from which their existence may be inferred by the jury.

The giving of an instruction defining the crime, which omits these elements, will operate a reversal, although the offense be correctly described in another instruction. The latter does not cure the former.

2. *Criminal law—Murder—Malice—Presumptions as to.*—Malice is essential to murder both in the first and second degrees; and where unlawful killing is proved to have been done with a dangerous weapon likely to produce death, the malice requisite to murder is presumed.—(See *State vs. Lane*, *post* p.—.)

Error to Perry Circuit Court.

J. L. Smith, Atty Gen'l, for Plaintiff in Error, cited: *Wagn. Stat.*, 445; *State vs. Foster*, 61 Mo. 549; *State vs. Hudson*, 59 Mo. 135; *State vs. Joeckel*, 44 Mo. 234; *State vs. Saunders*, 53 Mo. 234.)

J. C. Killian & Wm. H. Bennett, for Defendant in Error, cited: *State vs. Shoultz*, 25 Mo. 128, Instruction No. 11, p. 153; *State vs. Hays*, 23 Mo. 287; *State vs. Nueslein*, 25 Mo. 111; *State vs. Joeckel*, 44 Mo. 234; *State vs. Holme*, 54 Mo. 153.

NORTON, Judge, delivered the opinion of the court.

Defendant was indicted in the Circuit Court of Perry County for murder in the first degree, for killing one Augustus Washington. He was put upon his trial, which resulted in his conviction for murder in the first degree. An ineffectual motion for new trial was made and the case is brought here for review on writ of error.

The only point relied upon by defendant's counsel is the action of the court in giving instructions.

It does not appear from the record that any instructions were asked either on the part of the State or the defendant, but the court of its own motion gave eleven instructions—to the giving

of those numbered 1, 2, 5, 6, 7, 8 and 10, defendant excepted at the time.

The only instruction given, to which our attention has been specially called by defendant's counsel is that which follows, viz: "The court instructs the jury that if they believe from the evidence that defendant did willfully, that is, intentionally, kill deceased, then, and in such case, there is no murder in the second degree or manslaughter in the first, third or fourth degrees in the case; but the offense is either murder in the first degree or manslaughter in the second degree, or justifiable homicide accordingly as you may find the facts in proof: that is to say, if defendant willfully killed the deceased, in malice, that is, without sufficient cause or excuse, it is murder in the first degree. If defendant and deceased had a difficulty and you find from the evidence that defendant did not bring it about, or court or seek it, or voluntarily enter into the same, during the combat, and that while defendant was under the influence of passion caused thereby, he willfully killed deceased without malice, it is manslaughter in the second degree. If, on the other hand, you find that defendant courted, sought or brought on the difficulty and willfully killed deceased, it is murder, and if you find that defendant commenced or brought about the difficulty, or voluntarily entered into the same, then there is no manslaughter at all in any of its several degrees in the case.

This instruction, in so far as it declares to the jury that if defendant willfully killed deceased in malice, it was murder in the first degree, is in conflict with the views expressed by this court in the following cases. (State vs. Joeckel, 44 Mo. 234; State vs. Dunn, 18 Mo. 419; State vs. Starr, 38 Mo. 270; State vs. Underwood, 57 Mo. 49; State vs. Foster, 61 Mo. 549; State vs. Holmes, 54 Mo. 153; State vs. Lane, *post* 319.)

Under the instruction the jury are not required to find either deliberation or premeditation, which are elements entering into the offense and are necessary to make up the crime of murder in the first degree, under our statute. They are not presumed, but are to be proved as other facts, either by direct or circumstantial evidence. It is not necessary that the proof should be express or posi-

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tive—they may be inferred from the circumstances attending the killing, and if the jury can reasonably and satisfactorily infer their existence from all the facts in proof attending the killing, they would be warranted in finding that the offense was murder of the first degree.

Malice is common both to murder in the first and second degrees, and when the unlawful killing is proved to have been done by a dangerous weapon, likely to produce death, the malice requisite to murder is presumed. The error pointed out in the above instruction is not cured by the fact that the court, in a previous instruction, had properly defined murder in the first degree, and told the jury that if they believed defendant willfully, deliberately and premeditatedly, and of his malice aforethought, killed the deceased, they would find him guilty of murder in the first degree.

For the reason above given, the judgment will be reversed, and the cause remanded for a trial; the other judges concur.

—o—

F. W. CHAFFE, Respondent, vs. THE MEMPHIS, CARTHAGE & NORTHWESTERN R. R. Co., et al., Appellants.

1. *Prom. note—Endorser treated as prima facie maker, when—Accommodation endorsement, agreement as to—Notice of to holder—Notarial protest—Effect of.*—Parties whose names are written on the back of a note before delivery to the payee are *prima facie* liable as makers. And the holder before maturity for value is not bound by an agreement between them and the payee, of which he had no knowledge at the time of transfer to himself, that they should be held only as accommodation endorsers. And the certificate of the notary of a bank to which the note had been given for collection without instructions, that he demanded payment of them and afterwards gave them notice of their own refusal to pay, is wholly inadmissible as evidence to charge the holder with notice of such agreement.
2. *Practice, civil—General objection—Evidence excluded on account of—Ruling may be reviewed, when.*—Where testimony is excluded on a general objection, the fact that the objection is not specific, will not prevent a review of the ruling of the court, and a reversal, if the testimony was competent.

Appeal from Jasper Court of Common Pleas.

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Walser & Cunningham, for Appellants, cited: *Cahn vs. Dutton*, 60 Mo. 297; *Mammon vs. Hartman*, 51 Mo. 168; *Seymour vs. Farrell*, 51 Mo. 95; *Kuntz vs. Temple*, 48 Mo. 77; *Western Boatmen's Benevolent Ass'n, vs. George C. Wolff*, 45 Mo. 104; *Sanderson vs. Reinstadler*, 31 Mo. 483; *Gilchrist vs. Downell*, 53 Mo. 591; *Edw. Bills & Notes*, 219; *State vs. Vaughn*, 36 Mo. 95; *Gerhardt vs. Boatmen's Savings Institution*, 38 Mo. 62; *Downzelot vs. Rawlings*, 58 Mo. 75; *Gerhke vs. Jod*, 59 Mo. 522; *Moore vs. State Bank*, 6 Mo. 379; *Edw. Bills & Notes*, 229, 273; *Hayward vs. National Insurance Co.*, 52 Mo. 181; *Mechanic's Bank vs. Shaumburg*, 38 Mo. 228; *Sto. Agency*, § 140.

J. P. Ellis, for Respondent, cited: *Powell vs. Thomas*, 7 Mo. 440, down to the present time; *Lewis vs. Harvey*, 18 Mo. 74; *Schneider vs. Schiffman*, 20 Mo. 571; *Seymour vs. Farrell*, 51 Mo. 95; *Western B. B. Ass'n vs. Wolff*, 45 Mo. 105; *Mammon vs. Hartman*, 51 Mo. 108; *Kuntz vs. Temple et al.*, 48 Mo. 71; *Cahn vs. Dutton*, 60 Mo. 296; *Hardin vs. Phelps*, 51 Mo. 332; *Emmerson vs. Sturgeon*, 18 Mo. 170; *Boland vs. Mo. R. R. Co.*, 36 Mo. 484; *Callahan vs. Warne*, 40 Mo. 131.

HOUGH, Judge, delivered the opinion of the court.

This was an action against the Memphis, Carthage and Northwestern Railroad Co., L. P. Cunningham, George P. Cunningham, T. Reagan and E. H. Brown, as makers of a promissory note for \$6,005.00 dated March 14, 1873, and payable one year after date to the order of W. L. Burlingame.

There was a verdict and judgment for the plaintiff, from which L. P. Cunningham, George P. Cunningham and T. L. Reagan have appealed to this court.

The names of E. H. Brown and the appellants were not subscribed to the note, but were written on the back thereof before its delivery to the payee, and *below* their signatures was the following endorsement: "Pay to the order of F. W. Chaffee, W. L. Burlingame."

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The appellants were *prima facie* liable as makers. (Powell vs. Thomas, 7 Mo. 440; Lewis vs. Harvey, 18 Mo. 74; Schneider vs. Schiffman, 20 Mo. 571; Western Benevolent Boatman Ass'n vs. Wolff, 44 Mo. 105; Kuntz vs. Temple, 48 Mo. 71; Seymour vs. Farrell, 51 Mo. 95; Mammon vs. Hartman, 51 Mo. 168; Cahn vs. Dutton, 60 Mo. 297.)

The plaintiff was the holder of said note for value before maturity. It was agreed between the payee, W. L. Burlingame, and the appellants, that the latter were not to be held liable on said note otherwise than as accommodation endorsers.

The plaintiff was not bound by this agreement unless he had notice thereof, before or at the time of the transfer of the note to him. (Schneider vs. Schiffman, 20 Mo. 571.)

For the purpose of proving at the trial that the plaintiff had notice of this agreement, when he purchased said note, certain testimony was offered by the appellants which was objected to by the plaintiff and was excluded by the court.

The plaintiff contends that the action of the trial court, in excluding the testimony, cannot be reviewed by this court, inasmuch as the grounds of his objection thereto do not appear in the record. This position is plainly untenable.

When a party objects to the introduction of testimony, and the court overrules such objection and admits the testimony, in order that the action of the court in overruling the objection may be reviewed in this court, it is generally necessary that the specific grounds of objection shall be stated in the record. But where testimony is excluded on a general objection, the party objecting cannot be heard to say that the ruling of the court cannot be reviewed because his objections were not specific. In such cases, if this court should be of opinion that rejected testimony was competent for any purpose, it will revise the action of the lower court.

It is evident, however, in the present case, that the testimony offered was rejected because in the judgment of the Common Pleas Court it did not conduce to show that the plaintiff had notice of the agreement between Burlingame and the appellants, when he purchased the note sued on; for the court expressly declared, where evidence of the agreement was admitted, that such

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evidence would be excluded by instruction, unless it was supplemented by testimony tending to show that the plaintiff had notice of such agreement.

The testimony offered by defendants to charge the plaintiff with notice, consisted of the original petition filed by plaintiff in the present action and the notary's certificate of protest.

Neither of these papers, in our opinion, tend, even in the remotest degree, to show that when plaintiff bought the note in suit he had any notice whatever that the appellants were to be held only as accommodation indorsers, or that he ever sought to hold them liable in any other capacity than that of makers.

The original petition charged that the defendants, the Memphis, Carthage and Northwestern Railroad Co., L. P. Cunningham, George P. Cunningham, T. Reagan and E. H. Brown, heretofore, to-wit: "on the 14th day of March, 1873, by their promissory note herewith filed, dated the day and year aforesaid, promised to pay one year after the date aforesaid, to the order of W. L. Burlingame, six thousand and five dollars (\$6,005), with interest thereon at the rate of ten per centum per annum, from the date thereof, for value received, and deliver the same to said Burlingame."

The petition further alleges the endorsement of said note by Burlingame to the plaintiff; that payment was demanded of defendants, which was refused; that said note was thereupon protested for non-payment, and prayed judgment for the principal sum with interest, damages and costs.

There is nothing in all this to show that the plaintiff sought to charge the appellants as endorsers; on the contrary, he distinctly alleged that they were makers. Whether the plaintiff was entitled to all the relief asked was a question of law which could not affect the statement of facts. It appears from the notary's certificate that he demanded payment of the note in suit from the treasurer of the Memphis, Carthage & N. W. R. R., and the defendants, L. P. Cunningham, George P. Cunningham and T. Reagan, and afterwards gave them notice of their own refusal to pay. This equivocal act of the notary, who was the mere agent of a banking firm to which the note had been given by the plaintiff for col-

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lection, without instructions, is wholly insufficient and inadmissible to charge the plaintiff with notice of the agreement between the appellants and Burlingame.

We perceive no error in the ruling of the court excluding the testimony offered, and its judgment will therefore be affirmed. Judge Wagner absent. The other judges concur.

—o—

A. P. RITTENHOUSE, Adm'r, Respondent, vs. P. H. AMMERMAN,
Appellant.

1. *Administrator—Note made payable to—Term administrator, etc., a surplusage or descriptio personæ, when.*—An administrator can maintain an action in his own name on a note made payable to him as administrator or executor, the official words being treated as mere surplusage or as *descriptio personæ*.
2. *Promissory note—Descriptio, personæ—Executor, when personally liable on—Re-imbursement out of estate.*—In suit on the following note, to-wit: "three months from date promise to pay to order of A. and B. fifteen dollars" etc., etc., with interest at ten per cent. per annum, and if interest be not paid annually to become as principal," etc.

(Signed)

"P. H. Ammerman,

Executor of last will of James Johnson, deceased;"

it was *held* that as the instrument contained no words showing an intention to charge the estate, the terms "executor," etc., should be treated merely as *descriptio personæ*; that the fact of payment to be made at a future day with the interest named, might of itself be sufficient to show a personal undertaking of the executor; that the note of itself imparted a consideration and that it devolved on the maker and was competent for him, if he designed to set up that defense, to show that as his individual contract it was without consideration, and that the payee agreed to look only to the estate. And in such case where the consideration of the note accrued after death of the testator, the administrator will in the first instance be liable *de bonis propriis*; but he may re-imburse himself out of the assets of the deceased.

Appeal from Maries County Circuit Court.

Lay & Belch, for Appellant.

Signed as it was there could be no personal liability nor judgment *de bonis propriis* on the note. The intent to bind only the assets of the estate is plain on the face of the instrument.

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In the case of *Bank of Troy vs. Tapping*, 9 Wend. 273 ; 13 Wend. 557, it was held that the executor is not liable unless it be shown that he had assets.

In 13 Wend. it was held that the giving of the note was *prima facie* evidence that there were assets. But in this case it was admitted that there were no assets, and that the estate was and is insolvent. If, however, a personal liability was created by the giving of the note, the admission of the insolvency of the estate of appellant's intestate relieves him from such liability, upon the ground that there was no *consideration*. (See Will. Ex'rs vol. 2, p. 1610 ; *Eick vs. Vanderpool*, 8 Johns. 120 ; *Shoonmaker vs. Roosa*, 17 Johns. 301 ; *Colb vs. Page*, 17 Penn. St. (5 Har.) 469 ; *Beale & Co. vs. Ridgeway*, 18 Ala. 117.)

A. P. Rittenhouse, for Respondent, cited : *Pars. Notes and Bills*, vol. 1, p. 161 ; same, p. 89 ; *Pars. Contr.*, vol. 1, p. 250.

NORTON, Judge, delivered the opinion of the court.

The defendant in this case was the executor of one James Johnson, deceased, and as such he procured Johnson and Rittenhouse, who were engaged in publishing a newspaper, to publish notices for the sale of his testator's land, and afterwards executed and delivered three several negotiable notes, payable to said Johnson and Rittenhouse, for such publication. The plaintiff, as administrator of the partnership estate of Johnson and Rittenhouse, instituted suit on said notes against defendant Ammerman, and obtained judgment against him. On the trial it was admitted that the estate of James Johnson was insolvent, and objection was made to the introduction of the notes in evidence, which was overruled, and judgment rendered against defendant *de bonis propriis*.

The questions presented for determination are: 1st. Is the defendant liable in his individual or representative capacity, and if liable, is there a sufficient consideration to support the promise to pay?

The individual liability of defendant is in a great measure to be determined from the character of the notes themselves. The

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following is a copy of one of them, the other two being like it in all respects except as to date, amount, and time of payment.
\$15.00

VIENNA, Mo., June 18th, 1874.

Three months after date I promise to pay to the order of Johnson and Rittenhouse the sum of fifteen dollars for value received, negotiable and payable without defalcation or discount, and with interest from date, at the rate of ten per cent. per annum, and if the interest be not paid annually, to become as principal and bear the same rate of interest.

P. H. AMMERMAN.

Executor of last will of James Johnson, deceased.

It has been repeatedly held that an administrator can maintain an action in his own, individual name, on a note made payable to him "as administrator, etc.," or "as executor, etc.;" the words "administrator, etc." being mere words descriptive of his office or title to be rejected as surplusage or as *descriptio personæ*.

No reason is perceived why this rule of construction should be departed from in the present instance, especially when the notes themselves contain no words indicating an intention or purpose to charge the assets of the intestate with their payment. If such had been the intention of the parties, or the maker of the note, it could easily have been expressed on the face of the paper, and in the absence of such an expression it cannot be inferred.

The notes show that the amounts named therein were to be paid at a future day with a rate of interest agreed upon, with which the defendant had no right in his capacity of executor to charge the estate, by his own personal obligation. Such a writing from these facts alone appearing upon it might well be construed to be the personal undertaking of the executor. (2 Vol. Will. on Exec'r 1613.) If the notes are to be regarded as the individual notes of the defendant, then it is said the promise to pay is without consideration. The notes import a consideration, and it was for the defendant to show that they were given without consideration. For this purpose it would have been competent for defendant to show that at the time the notices were published by Johnson and Rittenhouse at his request, the estate alone was to be looked to for the work done, and in the absence of

such proof the publisher might well look to him for payment, and his promise to pay would be supported by sufficient consideration.

It is said in (1 Pars. Bills 161.) that an administrator can only bind himself by his contracts; he cannot bind the assets of the deceased. If he make, indorse, or accept negotiable paper, he will be personally liable even if he adds to his own name the name of his office, as signing for example: "A. as an executor of B." for this will be only part of his description, or will be rejected as surplusage. But if he choose to exclude his personal liability expressly as by the words, "I promise to pay out of the assets of C. D. and not otherwise, then he is only bound as far as the assets extend." In the case at bar the executor could have limited his liability to the payment of the debt out of the assets of the estate. This, however, he has not done and the contract must be enforced as he has made it, and under it the only judgment which could have been rendered was a judgment *de bonis propriis*.

In the case of Woodbridge vs. Draper, (15 Mo. 327,) an analogous principle is recognized. It is there held that when an administrator sues upon a contract where the cause of action accrued to the intestate during his lifetime, and fails in the action the judgment for costs will be *de bonis testatoris*; but where the cause of action accrues to the administrator after the death of the intestate, and he sues and fails to recover, judgment for costs will be rendered against him *de bonis propriis* in his personal character. In such case, however, on a proper showing to the probate court having the estate in charge, he may be allowed his costs out of the assets of the estate. So in the case at bar Johnson and Rittenhouse, the publishers, had a right to look to the executor for the costs of publishing the notices, and the executor a right to look to the assets of the testator. In this particular the case we are considering is distinguishable from the cases to which we have been cited; for in most of them the promise of the executor or administrator related to the payment of debts created by the testator or intestate in his lifetime, and in such cases it has been held where there were neither assets, nor forbearance on the part

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of the creditor, the promise could not be enforced for want of consideration.

We think the judgment on the facts of the case was rendered for the right party and it will therefore be affirmed, which by the concurrence of the other judges is hereby done.

—o—

D. M. DULANEY, *et al.*, Respondents, *vs.* E. H. ROGERS, *et al.*,
Appellants.

1. *Fraudulent representation—Action for—What scienter necessary to be shown—Testimony as to intent may be rejected, when.*—In order to sustain an action, based on deceit or fraudulent misrepresentations, it must be shown that the party making them believed or had good reason to believe at the time, that they were false, or intended to convey the impression that he had actual knowledge of their truth, whereas he was aware in fact that he had no such knowledge, and it must appear that the other party relied upon them and was deceived by them to his injury.

In such suit where the fraudulent intent of the party is sufficiently made to appear from the facts in the case, his testimony that he had no such intent is properly excluded.

Appeal from Cooper County Circuit Court:

Hayden & Tompkins, for Appellants, cited: *Pasley vs. Freeman*, 2 Smith's Lead. Cas. p. 138; *Jollife vs. Collins*, 21 Mo. 342; *Wakeman vs. Dalley*, 8 Johns. 23; 10 Am. R. 551 (same case, 51 N. Y. 27); *Oberlander vs. Sperrs*, 45 N. Y. 169; *Meyer vs. Armidon*, Id. 175; *Lord vs. Godard*, 18 How. 198; *Russell vs. Clark, Exr's*, 7 Cr. U. S. 69.

Driffin & Williams, for Respondents, cited: *Cabot vs. Christie*, 42 Vt. 121; *Dunn vs. Oldham's adm'r*, 63 Mo. 181; *Wakeman vs. Dalley*, 51 N. Y. 27; *Myer vs. Armidon*, 45 N. Y. 69; *Marsh vs. Falker*, 40 N. Y. 562; 2 Hil. Torts, 146, § 11.

NORTON, Judge, delivered the opinion of the court.

This was a suit brought to recover damages for an alleged fraudulent representation, in writing, as to the solvency of one

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Burger. It is charged in the petition that defendants, for the purpose of giving said Burger credit, gave to him a statement in writing as follows :

“PILOT GROVE, Mo., Sept. 8, 1873.

“We, the undersigned citizens of Pilot Grove, and county of Cooper, State of Missouri, would hereby recommend to the favorable consideration of any lumber firm in Hannibal, Mo., Mr. Wm. H. Burger as being every way responsible and a good business man, and we believe and recommend him as a prompt and reliable gentleman.”

It is further alleged that said statement was on the 13th of September, 1873, presented to them at Hannibal, Mo., where they were engaged in business as lumber merchants, by said Burger, who requested them to sell him lumber on credit ; that between the 13th of September and the 28th of November of said year, relying on the representations contained in said statement, they were thereby induced to sell to said Burger the sum of \$2,502 87 ; that the statement in regard to the solvency of Burger was not true, but that he was wholly insolvent, and that defendants knew that said statement was not true ; by means of all which, plaintiffs had sustained damages to the amount of \$865.

The answer of defendant admitted the execution of the writing set out in the petition, and denied all other allegations contained therein. On the trial plaintiffs obtained judgment, from which defendants have appealed.

The principal error complained of is in the action of the court in giving and refusing instructions, especially the following one which was given, viz : “ It is admitted by the pleadings that defendants made the written representation concerning the solvency of W. H. Burger, read in evidence, and if the jury shall find from the evidence that the plaintiffs were, at the time stated in the petition, copartners in business, and that Burger presented the paper to plaintiffs, or either of them, and asked for credit for lumber, and that the plaintiffs, or any one of said firm, relying upon said representations were induced by the same to sell to said Burger the lumber mentioned in the petition, on credit ; and if the jury shall further find from the evidence that the said rep-

representations were not true, and that Burger was in fact insolvent, and that defendants at the time knew that he was insolvent, and not in any way responsible, or that they represented that they knew him to be in every way responsible when they were aware of the fact that they did not know whether he was solvent or insolvent, then the jury ought to find a verdict for the plaintiffs for any loss or injury they may have sustained by reason of said false representations."

The written instrument offered in evidence and signed by defendants, who as the proof shows were neighbors of Burger, was an open letter of credit to any lumber merchant in Hannibal, Mo., containing the assertion that Burger was in every way responsible. It was dated on the 8th of September, and the record shows that it was accompanied with a certificate, signed by E. H. Harris the postmaster at Pilot Grove, certifying that the signers thereof are land owners and citizens of Pilot Grove township, and worth at least sixty-five thousand dollars. It cannot be questioned that the purpose of this statement was to enable Burger to purchase lumber on credit on the strength of the representation it contained in regard to his solvency. A distinct affirmation was made, (not simply an expression of opinion or belief) that he was in every way responsible. This instrument of writing was intended to be shown to strangers and persons unacquainted with the pecuniary condition of Burger, and it was well calculated to obtain credit for him, and suppress further inquiry as to the solvency of Burger on the part of those to whom it was to be exhibited.

It seems to be established that an action based upon the deceit or fraudulent representations of another, cannot be maintained in the absence of proof that the party making them believed or had good reason to believe at the time he made them that they were false, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. When the above facts are proven the *scienter* necessary to maintain an action for deceit, founded on fraudulent representations, is established. An innocent misrepresentation made through mistakes, without knowledge of

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its falsity, and with no intention to deceive, cannot justify a personal action for damages.

The *gist* of an action founded on fraudulent representations, when damage results, is, the fraud of defendants, and when it appears that a representation is made which is known to be false at the time it is made, and the person to whom it is made relies upon it and is deceived thereby to his injury, an action lies against the party making it. Whenever the above facts are proven the fraud necessary to give a right of action appears, and the intention to deceive is sufficiently shown.

In the case of *Milton Dunn vs. Jno. Q. Oldham adm'r*, 63 Mo. 181, it is said: "The now generally recognized doctrine is that in order to support a personal action for fraudulent representations it is not sufficient to show that a party made statements, which he did not know to be true and which were in fact false. There must be fraud as distinguished from mere mistake. It is not however always absolutely necessary that an actual falsehood should be uttered to render a party liable in an action of deceit, if he states material facts, as of his own knowledge and not as a mere matter of opinion or general assertion about a matter of which he has no knowledge whatever, this distinct, wilful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute a *scienter*." This principle is clearly enunciated in *Cabot vs. Christie*, 42 Vt. 121; *Marsh vs. Falkner*, 40 N. Y. 569; *Stene vs. Denney*, 4 Met. 151; *Meyer vs. Armidon*, 45 N. Y. 169, 175; *Wakeman vs. Dalley*, 51 N. Y. 35.

We therefore can perceive no error in giving the instruction complained of. In this view of the subject the objections to the action of the court, in refusing the instructions asked by defendant, are disposed of, and it is unnecessary to consider them in detail.

The objection to the second instruction given for plaintiffs was properly overruled. In it the jury were in substance told, that in determining the question of the solvency of Burger they would exclude from the consideration such property as by law was exempt from execution.

Ex Parte Jilz.

On the trial defendants were introduced as witnesses, and they were asked if it was their intention in signing the paper to defraud plaintiffs or others. The evidence thus sought was properly rejected by the court. When the facts constituting a fraud as before stated are proven, the intention to deceive sufficiently appears to authorize a finding.

On the whole record the judgment appears to have been for the right party, and no error being perceived it will be affirmed, in which the other judges concur.

—O—

EX PARTE W. W. JILZ.

1. *Habeas corpus*—Discharge of prisoner by circuit court—Re-arrest under same charge unlawful.—Under the statute law of this State, where a prisoner is brought before the judge of a circuit court having authority to issue the writ, on petition for *habeas corpus*, and the judge acquires jurisdiction of the person and the subject matter, his discharge of the prisoner, whether the decision be erroneous or not, being in favor of personal liberty, is final and conclusive and not subject to appeal; and the prisoner cannot be again arrested and committed on the same charge. And the rule applies to circuit courts of St. Louis county in like manner as to other circuit courts.
2. *Habeas corpus*—St. Louis Court of Criminal Correction—Sentence by, and appeal to St. Louis Court of Appeals—Jurisdiction of Supreme Court to grant writ.—Where a prisoner under sentence in the St. Louis court of Criminal Correction is discharged on *habeas corpus*, and re-arrested for the same offense, the fact that an appeal from the original sentence is pending in the St. Louis Court of Appeals, and that from that tribunal no appeal will lie in such case to the Supreme Court, will not prevent the latter court under an application for *habeas corpus*, from discharging the prisoner from his re-arrest. In such proceeding, the Supreme court exercises not an appellate but an original jurisdiction conferred by the constitution.

PER HENRY, J., concurring.

3. *Habeas corpus*—Discharge—Re-arrest—Supreme Court, jurisdiction of—*Res adjudicata*.—Where the prisoner having been once discharged by the lower court on writ of *habeas corpus* has been re-arrested for the same offense, and remanded to the same custody, the case is rendered *res adjudicata* by the first discharge. The Supreme Court has no appellate jurisdiction. And in case of such arrest, the Supreme Court may grant *habeas corpus*.

Petition for Habeas Corpus.

Chas. P. Johnson & H. B. Wilson, for Respondent.

I. The sentence of Jilz by the Court of Criminal Correction was valid, because: 1st. It was in conformity with the general law of the State prescribing the punishment for criminal abortion. (Wagn. Stat., 450, § 34.) 2nd. The 32nd section of the Act of 1869 (Session Laws of 1869, p. 199), affixing a different and milder penalty for the same offense, when committed in St. Louis County, is unconstitutional and void. (Am. Law Times, N. S. Vol. 3, No. 9, 135; *Dierkes vs. Janesville*, 28 Wis. 465; *Kelly vs. State*, 6 Ohio S. 269; *Wicker vs. Potter*, 18 Id. 85; *Bourland vs. Hildreth*, 26 Cal. 162; *Brooks vs. Hyde*, 37 Id. 366; *McAunich vs. Miss. & Mo. R. R. Co.*, 20 Iowa, 338; *Rice vs. State*, 3 Kan. 141; *State vs. Parkinson*, 5 Mo. 15.) And such a law is not the "Law of the Land." (*Vanzant vs. Waddel*, 2 Yerger, 270; *Banks vs. Cooper*, Id. 600; Wagn. Stat. 1087, § 8.)

II. The discharge of the prisoner upon *habeas corpus* by a judge of the circuit court was not *res adjudicata* and final.* And the court of criminal correction had power to re-commit Jilz, notwithstanding such discharge.

Under this statute, (Wagn. Stat., 693, § 55) if a prisoner "shall have been discharged from a commitment on a criminal charge" he may afterwards be committed for the same offense, by the legal order of the court wherein he shall be bound by a recognizance or in which he shall be indicted or convicted for the same offense."

That this statute was intended to cover just such a case as the one at bar is clear; and the authorities construing similar statutes fully recognize the power of the court having jurisdiction of the case to re-commit in such cases.

But the circuit court of St. Louis County had no jurisdiction of the case upon which Jilz was convicted. And it is a monstrous doctrine, that a court having no jurisdiction of the case, either by appeal or otherwise, may thus interfere, and prevent the sentence from being carried out.

In *Yeats vs. The People*, (6 John. 335)—cited by relator—the doctrine that a court of criminal jurisdiction has the power, in such cases, to re-commit for a criminal offense was fully recognized.

And in *Yates vs. Lansing*, (9 John. 395) it was held that “where a judge, in vacation, on *habeas corpus*, discharged a person committed by the chancellor on a conviction for a contempt and he was again re-committed for the same course, such re-commitment was legal.” And the court in this opinion, add among many other things in point, that the contrary view would in effect enable a court to “exercise the power of pardoning convicts.” It is clear that if the doctrine insisted upon by relator is a sound one, then any judge of a county court in the State may discharge a person convicted of murder, and he could never be legally re-arrested or re-committed. (*Hurd Hab. Corp.*, 557, *et seq.*; *John vs. Yeats*, 4 John. 318; *Yates vs. Tanson*, 5 John. 282; *Yates vs. The People*, *supra*; *Yates vs. Lansing*, *supra*.)

III. The only remedy of relator is by writ of error or appeal. (*Ex parte Toney*, 11 Mo. 662; *Ex parte Rathburn*, 17 Id. 541; *Davis vs. Lucky*, 1 Watts. 66; *Comm. vs. Hambright*, 4 Serg. & Rawle, 149.)

IV. Inasmuch as the St. Louis Court of Appeals has exclusive appellate jurisdiction of the offense for which relator was convicted, we submit that the Supreme Court has no jurisdiction to discharge in this case. To hold that this court have jurisdiction will tend to bring about an unnecessary conflict between the two courts.

It is admitted that relator has appealed his case to that court where it is now pending; and that he did not apply for a *superseas* as he might have done.

Suppose the Court of Appeals should affirm the sentence, will this court assume to render such affirmance nugatory, by discharging the prisoner? This court has no jurisdiction of the case, and, if it does discharge, its action discharging the relator will be of no more binding force than that of the circuit court.

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U. C. Simmons, with R. S. McDonald, for Petitioner.

The re-commitment of the petitioner on the same sentence, and for the same cause, after his discharge by Judge Lindley, was wholly illegal and inoperative. That judge was invested by law with the discretion and full power and authority to determine and adjudge whether prisoner should be remanded or set at liberty, and his decision and judgment, whether erroneous or correct, were irreversible. Even this court had no power to interfere on an appeal or writ of error. (*Howe vs. The State*, 9 Mo. 682.) The doctrine of *res adjudicata* applies to this case in all its force. The Court of Criminal Correction after that discharge had no power or authority whatever. The decision of Judge Lindley was as effectual as if it had been rendered by this court, and the judge of the Court of Criminal Correction has the same right to disregard and subvert the order of this court as he has that of Judge Lindley.

The position here taken is in strict accordance with long established and incontrovertible authority. (See *Yates vs. People*, 6 Johns. 337, in which the decision of the Supreme Court in the same case reported in 4 Johns. 317 was reversed; also *Cable vs. Cooper*, 15 Johns. 152; *Spalding vs. The People*, 7 Hill N. Y., 301; *Martin vs. State*, 12 Mo. 470; *Howe vs. State*, 9 Mo. 682.)

NORTON, Judge, delivered the opinion of the court.

The petitioner on the 12th of August, 1876, was tried in the St. Louis court of criminal correction and was convicted of criminal abortion, and was sentenced by said court to imprisonment in the St. Louis county jail for the term of one year and to the payment of a fine of \$500. Under said sentence he was committed to the jail of said county, and there remained until the 22d day of August, 1876, when he applied to James J. Lindley, a judge of the circuit court of St. Louis county for a writ of *habeas corpus*, which was by said judge issued, and on a hearing of the same, the said Jilz was discharged from his said imprisonment on the same day, on the ground that the court of criminal correction had exceeded its power in sentencing him, Jilz, to confinement in the county jail of St. Louis county for one year, and that the sen-

tence under it and the commitment were void. After said Jilz was thus discharged, he was again on the 29th day of September, 1876, re-committed to the jail of St. Louis county on a re-issue of the same commitment upon which he was originally imprisoned, and from which he had been discharged by Judge Lindley.

Petitioner Jilz now seeks to be discharged from this last imprisonment on the following grounds:

1st. Because the judgment and sentence of said court of criminal correction was void, in this, that under the law applicable to St. Louis county, said court only had jurisdiction to sentence him to an imprisonment for the period of six months in the city work house of the city of St. Louis:

2d. Because having been once discharged on *habeas corpus* by Judge Lindley, who had power to hear and determine the legality of his imprisonment, his re-arrest and re-imprisonment on the re-issue of the same commitment were illegal and void.

If the second reason assigned by petitioner for his discharge be well founded, it will dispense with a consideration of the first. Our attention will therefore be directed to it.

It is not denied but that Judge Lindley had the legal right to issue the writ of *habeas corpus* which was issued by him on the 26th day of August, 1876. If the Circuit Judge had power to issue the writ—which is conceded—such judge acquired jurisdiction over the subject matter, when the office of the writ had been partially performed, in bringing before him the prisoner with the cause of his detention and imprisonment.

In the case of *Martin vs. The State*, (12 Mo. 474,) where one Jackson was imprisoned by virtue of an indictment found in the criminal court of St. Louis county, and not having been brought to trial at the end of the second term after the indictment was found, he was discharged on *habeas corpus* by a judge of the circuit court of St. Louis county from his imprisonment, Martin, the jailor, having him in custody, was ordered by the criminal court to retain Jackson in custody to answer the indictment, but disregarded the order of the criminal court and discharged Jackson in obedience to the order of the Circuit Judge. Martin was fined for

contempt in disobeying the order of the criminal court, and appealed to this court from the judgment imposing the fine. In the disposition of the case it became necessary to consider the action of the Circuit Judge in discharging Martin, and Judge Ryland, speaking for the court, observed: "The St. Louis circuit court, and the judge thereof, in vacation, had the power to grant and issue the writ. This gives to such court or judge jurisdiction over the matter; and though the statute expressly declares that 'no person imprisoned on an indictment found in any court of competent jurisdiction, or by virtue of any process or commitment to enforce such indictment, can be discharged under the provisions of this act, but may be let to bail if the offense be bailable, and if the offense be not bailable he shall be remanded forthwith,' yet this section does not take away the jurisdiction, but orders and directs what shall be done. A circuit judge, therefore, discharging, against this provision of the statute, may be considered as acting indiscreetly, even erroneously. Yet having jurisdiction over the subject, his order discharging must be considered a justification to the jailor in turning out the prisoner. * * * * The circuit judge having authority to issue the writ of *habeas corpus* (and this point the attorney for the State in his brief admits, but contends that all the subsequent acts of the judge are not only against but beyond his jurisdiction and are utterly void), his act afterwards in discharging Jackson, the prisoner, although it may have been erroneous and contrary to law, yet it could not be said to be an act *coram non judice*."

So, also, in the case of *Ex parte Page*, (49 Mo. 291,) it was held by this court "that Page, who had been convicted of grand larceny and sentenced to the penitentiary for ten years, was entitled to his discharge on proceeding by *habeas corpus*, on the ground that the judgment of the court sentencing him to ten years was void, because the highest punishment under the law was seven years for such offense."

Judge Lindley, of the circuit court, having thus acquired jurisdiction of the person and subject matter, was authorized and required to determine the question as to the legality of the imprisonment, and whether he decided erroneously or not, is immaterial,

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the discharge of the prisoner being in favor of personal liberty is final and conclusive. In proceedings by *habeas corpus* this court only exercises original jurisdiction, and in issuing the writ and determining the questions arising under it, possesses no more power than is possessed by a circuit or county court, or any judge or officer authorized by law to issue the writ and authorized to remand, admit to bail or discharge the prisoner, according to the circumstances of the case.

In the case of *Howe vs. The State*, (9 Mo. 690,) it was held that an appeal from a judgment of the circuit court, refusing to discharge a prisoner on *habeas corpus*, would not lie to this court.

In case of *Ex parte Long*, (11 Mo. 662,) it was also held that "in deciding on the propriety of discharging a prisoner on *habeas corpus*, this court exercises no appellate jurisdiction."

It would seem, therefore, that if a judgment of a circuit court refusing to discharge a prisoner, was conclusive, or not subject to be reviewed on appeal, a judgment of a court or judge discharging a prisoner, ought in like manner to be conclusive, especially when the statute expressly provides that "no person who has been discharged by the order of any court or magistrate upon a writ of *habeas corpus*, issued pursuant to this chapter, shall be again imprisoned, restrained, and kept in custody for the same cause," etc. (Gen. Stat. 629, § 55.)

The case, *Yates*, (4 Johns. 318,) is very analogous in some of its features to the case at bar, and the questions involved were most ably and thoroughly discussed. Yates was committed to jail by a court of chancery for contempt of court. He applied to Justice Spencer for a writ of *habeas corpus*, and was by him discharged. After he was discharged the court of chancery ordered his arrest and imprisonment on the same charge. He applied to Justice Spencer again for a writ of *habeas corpus*, and was again by him discharged. After this discharge he was again arrested and imprisoned on the order of the chancery court on the same charge. An application was subsequently made to the Supreme Court by Yates for a writ of *habeas corpus*, which was granted, and after a full hearing the prisoner was remanded to custody. He then sued out a writ of error, and the case was

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heard by the court of errors, and is reported in 6 Johns. 337. The decision of the Supreme Court in 4 Johns, was reversed by the court of errors and the prisoners discharged.

Clinton, who delivered the opinion, concurred in by a majority of the court, considered the following points with others :

1st. Whether a judge in vacation had jurisdiction in the case?

2d. Whether a person discharged on a *habeas corpus* can be re imprisoned for the same offense :

In passing upon the two points he observes : "A judge is certainly constituted a tribunal to pronounce upon the legality of a commitment. He is not to intermeddle when the prisoner is a convict or in execution by legal process—when he is detained by legal processes—out of criminal courts for some matter or offense not bailable. If a prisoner is brought before a judge on *habeas corpus*, who is to determine on the legality of a commitment? Is he to take it for granted that every commitment of every court and magistrate for offenses not bailable is legal, and to remand the prisoner accordingly? Will not this render the *habeas corpus* act of little value, and circumscribe its operation in a most pernicious manner? The judge has jurisdiction, and, if he has jurisdiction, his judgment may be erroneous, but it cannot be void. If he decides that the process is illegal, he may err, and so may all courts, but erroneous judgments are not void but voidable. If, then, the judge had jurisdiction in the cause, whether he decided erroneously or not, is immaterial ; his discharge being in favor of personal liberty is final and conclusive. He is, in that respect, a court of *dernier* resort." He also observes in speaking of the provision of the statute of New York, similar to our own, "that no person who shall be set at large upon any *habeas corpus*, shall again be imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause.

This provision appears to set this branch of the inquiry at rest. It is the same as in the English statute, and evidently refers, when speaking of the court where the prisoner is bound to appear or a court having jurisdiction of the cause, to the case of persons

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bound to appear and answer for crimes in criminal courts. If the right of the imprisonment is sustained in other cases, the benefits of the writ of *habeas corpus* may be greatly evaded if not completely nullified. I consider it, therefore, of great importance to personal liberty to resist this extraordinary doctrine. Abuses may indeed occur in the exercise of the powers of a judge under the *habeas corpus* act, but if he errs in favor of personal liberty he errs on the safe side, and his decision ought not to be called in question. That any re-commitment in this case is illegal, I think cannot be doubted. The prisoner was discharged from custody, and the judgment of the Supreme Court remanding him to imprisonment was reversed by the court of errors.

The conclusion arrived at in the case of Yates, was reached after a most thorough and searching investigation by some of the ablest and most learned judges of that day, and commends itself to our favorable consideration as being in consonance with the justice of the case and sound logic. In the light, therefore, of the cases above cited, as well as the provisions of our statute regulating proceedings of this character, and expressly prohibiting the re-arrest and re-commitment of a prisoner after being discharged by a court or officer having jurisdiction of the person and authority to act in regard to the subject matter, the re-arrest and re-commitment of Jilz by the St. Louis court of criminal correction was unauthorized, and his imprisonment thereunder illegal. It is no argument against this conclusion to say that a judge or officer authorized to issue this writ of right may commit a mistake and release from confinement a citizen who ought not to be released. Under any system of jurisprudence, no matter how perfect and complete it may be, mistakes will sometimes be made and errors committed. Questions of law or fact, whether the determination of them be confided to the court or jury, owing to the imperfections incident to all human reasoning, are often improperly and erroneously determined, yet when they are determined by those who are by law entrusted with their determination, that is an end of the matter. If, even, as in this case, a person convicted of a misdemeanor, brutal in its character, and which shocks the moral sense of the whole community, should be entitled to his discharge

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by reason of any error committed, it is better that it should be so than that a principle should be recognized or a rule laid down which would practically render the writ of *habeas corpus* a nullity, and bring into constant danger and peril the liberty of the citizen. We deem it unnecessary, for the purpose of this case, to enter into a consideration of the question whether the act requiring the St. Louis court of criminal correction to sentence persons, who are convicted of misdemeanors in St. Louis county, to the work house of the city of St. Louis for the period of six months, is or is not obnoxious to the constitution, on the ground of its being a partial or local and not a general law. Upon this point we express no opinion, nor is it necessary to do so.

It is argued that inasmuch as Jilz, on the 19th day of August, 1876, took his appeal to the St. Louis court of appeals from the judgment of the St. Louis court of criminal correction, the constitution, in providing that no appeal in such cases from the judgment which the St. Louis court of appeals might render should be allowed, deprives this court of its original jurisdiction to issue writs of *habeas corpus*, and to hear and determine the same.

If, in issuing writs of *habeas corpus*, and in determining the questions arising thereunder, this court could exercise appellate jurisdiction, there might be some ground for the proposition contended for. It has, however, been expressly decided in the cases herein cited, that in a proceeding of this character this court cannot exercise any appellate jurisdiction whatever. It therefore necessarily follows that the prohibition of an appeal from any decision which might be rendered by the St. Louis court of appeals does not prohibit this court from the exercise of a jurisdiction bestowed by the constitution in the exercise of which (as in *habeas corpus*) it does not act as an appellate court. For the reasons expressed herein, we think the prisoner is entitled to a discharge from the imprisonment of which he complains, and with the concurrence of the other judges will be so ordered.

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Per HENRY, J., concurring.

I fully and heartily concur in the foregoing able opinion, and hold that the judgment of Judge Lindley, discharging Jilz from the custody of the jailor, was final and conclusive, and that neither the court of criminal correction, nor any other court in the State could re-commit him on the original sentence.

The position of the counsel for the State, and the ground necessarily taken by any one holding that the action of the court of criminal correction was proper, is that, although the statute authorized Judge Lindley to issue the writ, and when Jilz was brought before him he acquired jurisdiction of his person and of the cause, yet he had no jurisdiction to discharge him, unless he should decide properly the legal questions involved. In other words, if the sentence pronounced by the court of criminal correction was right, Judge Lindley had jurisdiction to re-commit, but none to discharge Jilz, and Judge Cady had the right, and it became his duty, to disregard the order of discharge and re-commit him.

In the matter of DaCosta (Park. Crim. Cas. 129) it was held by the Supreme Court of New York, that "the principle of *res adjudicata* is applicable to proceedings upon *habeas corpus*." That was a case in which the petitioners had been remanded to the custody of the person who held them, but the principle of that is none the less applicable to this case. Our statute gives the prisoner this writ as often as he may find a court or officer superior to the one to whom he last made his application, authorized to issue it. In his petition he is required to state, "that no application for the relief sought has been made to or refused by any court, officer or officers, superior to the one to whom the petition is presented."

In the case of DaCosta, *supra*, the observation of Senator Paige is quoted and approved, that, "if a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata* the consequence will be lamentable. This favored writ will become an engine of oppression instead of a writ of liberty."

In the same case (*Mercien vs. People, ex rel Barney*, 25 Wend. 64) the chancellor delivering the opinion also held that, "the principle of *res adjudicata* was applicable to a proceeding upon *habeas corpus*."

Neither the court of appeals nor the Supreme court exercises appellate jurisdiction when it issues this writ, and its judgment, in this proceeding, is of no more force or validity than that of a justice of the county court, or a circuit judge.

In *Ex parte Toney* (11 Mo. 662) Judge Napton observed that, "in deciding on the propriety of discharging a prisoner on *habeas corpus*, this court exercises no appellate jurisdiction. In the exercise of this power it is confined within the same limits which would restrain a judge of the circuit or county court in its exercise. It can give no other or greater relief than is afforded by these officers. If the idea of all appellate jurisdiction is discarded, it will be obvious that neither this court, nor any other court nor officer, can investigate the legality of a judgment of a court of competent jurisdiction by a writ of *habeas corpus*. If the court has jurisdiction of the subject matter and of the person, although its proceedings may be irregular or erroneous, yet they cannot be set aside in this proceeding. The party must resort to his writ of error, or other direct remedy, to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive."

The court held in that case that Toney was not entitled to his discharge, and remanded him to the custody of the warden of the penitentiary; but suppose it had determined otherwise, was there any authority in the court, in which Toney was convicted and sentenced, to re-commit him, in defiance of the mandate of this court, whether it erred or not? Could the inferior court have reviewed and reversed the judgment of this court? When the court says: "Although its proceedings (proceedings of the court in which the conviction was had) may be irregular or erroneous, yet they cannot be set aside in this proceeding," it was not passing upon the effect of a judgment upon a *habeas corpus* discharging the prisoner, but announcing a rule by which courts, or

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officers issuing the writ, should be guided in determining what judgment to render.

If the doctrine of the Toney case be correct, and we fully indorse it, the court of criminal correction, if Jilz had sued out his writ in this court instead of the circuit court, and been discharged, could have re-committed him, and repeated the commitment as often as any court should, on *habeas corpus*. order his discharge, unless such order regularly issued were a finality. If we now discharge Jilz, what is to hinder the court of criminal correction from re-committing him, if the doctrine contended for be the law? And if this be the law, of what value is the writ of *habeas corpus*? The judge of the court, acting in a judicial capacity, would not be liable to the penalty prescribed by the statute, and if he were, what is the penalty. a hundred times recovered, in comparison of the personal liberty of a citizen?

But, it may be said, a county court justice may issue the writ and discharge one convicted of a felony, and sentenced to the penitentiary, by a circuit court. If this be so, the mistake was in authorizing such inferior courts to issue this writ, but far better were it that nine hundred and ninety-nine of every thousand guilty men should escape under this process, than that a writ, which in the past has accomplished so much for personal liberty, should be rendered inefficacious by judicial construction or legislative enactment.

It is the most celebrated writ known to our law, and has received such encomiums as have been pronounced upon no other judicial process belonging to ours or any other system of jurisprudence. Its origin is so far back in antiquity that its date cannot now be ascertained. It is older than *Magna Charta*, and for centuries has been held by Englishmen as the bulwark of their liberty, and is so highly esteemed by the people of the United States that it has been embalmed in the Federal Constitution, and in the Constitution of every State in the Union; and yet if the position of the counsel for the State be correct, it is of less value than a writ of replevin, or a *fieri facias*; for these do what they are designed to accomplish, while an inferior court can set at naught the judgment of the highest judicial tribunal of the

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land discharging one restrained of his liberty, and the victim of judicial oppression has no remedy but to resort again to his *habeas corpus*, again to be committed if such inferior court shall deem, or feign to believe, the judgment discharging him erroneous. With what propriety could it be denominated "the great writ of liberty," if this be the law? When, then, would a citizen illegally restrained of his liberty, get his final discharge on a *habeas corpus*?

This is no time to impair the efficacy of this writ. Now, more than ever before, should we be careful to preserve the "this dearest birthright of Britons," as, more than a century ago, it was characterized by the English colonists in America. No prison walls should be strong enough, against its mandate, to hold one for whom it issues, nor any judge or court too great to bow in submission to the judgment rendered in the proceeding by a tribunal authorized to issue the writ of *habeas corpus*.

I think that the prisoner is entitled to his discharge.

—O—

HENRY S. TURNER, Appellant, *vs.* LEVIN H. BAKER, *et al.*,
Respondents.

1. *Land and land titles—Unascertained boundaries—Agreement as to mode of establishing—Ejectment—Statute of frauds, etc.*—When the proprietors of contiguous estates, the boundaries of which are indefinite and unascertained, agree upon the line dividing their estates, the calls in their respective deeds fasten themselves upon the property to which they are thus applied, and the title passed by the conveyances covers and includes every part of the property so identified as being comprehended within the description contained in the grant. Such boundary, thus agreed upon, is to be considered the true one, and each proprietor becomes the legal owner of the land called for in his deed, up to such boundary. Such agreements are not within the statute of frauds, and ejectment may be maintained for all the land included within the calls of the deed, as located and determined by the agreement of the parties fixing the boundary.
2. *Lands and land titles—Coterminous proprietors—Dividing line, parol agreement changing location of—Statute of frauds.*—When the location of the true boundary dividing their estates is known to the coterminous proprietors and they attempt, for mutual convenience, or other sufficient reason, to transfer

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land from one to the other, by a parol agreement changing the location of such boundary, the statute of frauds will inflexibly apply.

3. *Boundary line, long acquiescence in agreement as to line may be inferred from when.*—Long acquiescence in the location of a boundary line, together with the acts and declarations of the parties treating the same as the true boundary, will authorize a jury to infer an agreement, between the parties, establishing such boundary.
4. *Forcible entry and detainer—Final judgment in—Relation, doctrine of.*—If A. being the true owner of a tract of land be disseized, and B., in an action of forcible entry and detainer against the disseizor, recover judgment against him, such judgment even when executed by a writ *habere facias possessionem*, will not relate to the institution of the suit so as to make the adverse possession of the disseizor, during the intervening time, the adverse possession of B. as against A. When premises are wholly vacant, the adverse possession follows the true title.
5. *Practice civil—Adverse possession—Instruction as to improper, when.*—An instruction is improper which leaves to the jury to determine the question what acts of ownership will amount to adverse possession.
6. *Ejectment brought in 1856—Petition sworn to, evidence of what.*—In 1856 a petition in ejectment being required to be sworn to amounted to a solemn admission that plaintiff at date of suit was out of possession.

Appeal from St. Louis Circuit Court.

Glover & Shepley, for Appellant.

The evidence is conclusive, 1st, that the line was located at Lindell's west fence and lived up to from 1824 to 1845; 2nd, that Lindells were put in possession in 1852 and down possibly to 1855; 3rd, that in 1856 Lindell's people were out of possession, and Lucas' people in possession, and the Lindells commenced suit for whole vacant space; sued McLaughlin on the south, and Hannegan on the north side Washington Ave., they being adverse occupants. These facts entitle the plaintiff, who sued January 7, 1865, to a recovery.

The location of the line by the agreement and acquiescence of the parties was conclusive as to the title. (12 Wend. 130; Jackson vs. McConnell, Id. 422; Rockwell vs. Adams, 7 Cow. 762; 6 Wend. 469; 13 Wend. 539; 7 Johns R. 238; Lindell vs. McLaughlin, 30 Mo. 28; Taylor vs. Zepp, 14 Mo. 482; Chouteau vs. Goddin, 39 Mo. 250; Rutherford vs. Tracy, 48 Mo. 325; Dolse vs. Vodicka 49 Mo. 98; Finnegan vs. Canahan, 6 Barb. 257; Garnhart vs. Finney, 40 Barb. 449; Allen vs. Sales, 56 Mo. 29.)

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Defendant's instruction No. 14 was erroneous. If no one was in actual possession, Lucas' representatives would be in constructive possession up to the located line. (*Griffith vs. Schwenderman*, 27 Mo. 412; *City vs. Gorman*, 29 Mo. 603; *Miller vs. Shaw*, 7 Id. 129; *Barr vs. Grady*, 4 Wheat. 224; *Wells vs. Prince*, 4 Mass. 65; *Harrison vs. Cachelin*, 23 Mo. 124; S. C. 35 Mo. 177.)

This instruction does not proceed upon the idea of a possession of part, and acts of ownership over the whole, but of acts of ownership by one out of possession.

The representatives of Lucas owned the land up to Lindell's west fence in 1854, their line having been fixed up to that fence, and when they entered and fenced it, it was vacant. Lindell's tenants were gone. Is it possible the Lindells could not abandon possession? That Lucas' representatives who owned the land could not enter upon their land and enjoy it? If not, who could? Could the Lindells who had no right west of their fence, and who would be trespassers beyond that line? (See 3 Blacks. 175; *Henderson vs. Griffin*, 5 Peters, 158; *McIver vs. Regan*, 1 Cooke, 366.) The possession of the Hannegans', by the consent of Lucas' representatives, made them their tenants. (See also *Henman vs. Cranmer*, 9 Barr, 40; *Hard vs. Bodley*, 5 Lit. 88; *Taylor vs. Shields*, 5 Lit. 295; 3 Wash C. C. 475-479.)

Henry L. Patterson and Wm. Fulton appeared in the suit the Lindells commenced against Hannegan in 1856, and were allowed to defend. This admitted Patterson and Fulton in possession of the whole tract sued for. Of course the Lindells were out of possession. (*Doe vs. Brennan*, 2 Dev. 174; *Pope vs. Buckner*, 1 B. Mon. 163; *Bufort vs. Gaines*, 6 J. J. Marsh. 39; *Troublesome vs. Estill*, 1 Bibb. 129.) The possession of Patterson and Fulton was hostile to Lindell's, not hostile to Lucas' representatives, Moore & Turner.

Defendant's instruction No. 15 was erroneous. It confounds the location of the line with the bar by limitation. The defense of limitation is wholly different. It concedes the want of title and relies on possession subsequent to the location of the line. But in this instruction the court says that no estoppel could be

made out without such possession as would bar the cause of action.

The court erred in rejecting the record of the suit which the Lindells commenced February 19, 1856, to recover possession of the land in dispute from John Hannegan. It was offered to show that the Lindells at the date of that suit were not in possession of any of the land in dispute; that they admitted they were out of possession; that one of them swore that the plaintiffs were not in possession.

B. A. Hill, for Respondents.

I. The court below erred in giving the instructions asked by the plaintiff and given by the court of its own motion. The doctrine of estoppel does not depend upon the proposition stated in the instructions given for the plaintiff, but is better stated in those asked by the defendant and refused by the court.

To raise an estoppel so as to pass title to real estate from the Lindells to Lucas, there must have been an express design on the part of the Lindells that their acts or statements should influence the actions of Lucas, and they must have had a knowledge of the facts. The right of the Lindells and their heirs to the land can be lost or forfeited only by such conduct as would make it fraudulent and against conscience to assert it. (*Combs vs. Cooper*, 5 Minn. 254, presenting a learned review of the doctrine of estoppel *in pais*; *Commonwealth vs. Moltz*, 10 Barr, 530, 1, in point; *Gavish vs. Proprietors of Union Wharf*, 26 Me. [13 Shep.] 384, 393; *Andrews vs. Lyons*, 11 Allen, [Mass.] 349; *Cumming's adm'r vs. Webster*, 43 Me. 192; *Rangely vs. Spring*, 21 Me. 130; *Wallace vs. Truesdale*, 6 Pick. 445; *Welland Canal Co. vs. Hathaway*, 8 Wend. 430; *Taylor vs. Ely*, 25 Conn. 250; *Preston vs. Mann*, Id. 118; *Copeland vs. Copeland*, 28 Me. 525; *Pickford vs. Sears*, 6 Ad. & El. 469; see also *Sullivan vs. Parks*, 33 Me. 438; *Witcher vs. Williams*, 20 Conn. 98; *Dyer vs. Coy*, Id. 568; *Steele vs. Putney*, 3 Shep. 327; *Strong vs. Ellsworth*, 26 Verm. 367; *Worrel vs. Lathrop*, 30 Id. 307; *McAfferty vs. Connover*, 7 Ohio, N. S. 99; *Lawrence vs. Brown*,

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1 Seld. 394; Taylor & Mason vs. Zepp, 14 Mo. 482; Jewett vs. Miller, 10 N. Y. 402.)

There is no evidence in this case that the Lindells ever made any declaration, or did any act, to induce Lucas to purchase the two arpents of land of O'Fallon, or to locate them upon the vacant space. It is manifest that neither the Lindells or Lucas ever knew anything in regard to the true boundary of their lands until 1845, when the Lindells had a survey made of the two by forty arpents. Then both parties ascertained their true lines, and the Lindells asserted their title and James H. Lucas would not assert his, but permitted the Finneys to possess until 1849, when they acquired title by the statute of limitations to Lucas' land.

The instructions for plaintiff are grossly erroneous, in making statements not shown by the evidence. (Miller vs. Platt, 5 Duer, N. Y. 272; Titus vs. Morse, 40 Maine, 348; Parker vs. Barker, 2 Met. 421; Richardson vs. Chickering, 41 N. Hamp. 380; Odin vs. Gove, Id. 465; Boggs vs. Wersel, 14 Cal. 279; Field, C. J. Id; Califf vs. Hillhouse, 8 Minn. 311.)

"Acquiescence in an erroneous line, and in an adverse possession in accordance therewith, is no bar to a recovery, unless continued so long that the statute of limitations attaches." (Jackson vs. McConnell, 19 Wend. 175; Brewer vs. Boston & Worcester Railroad Co., 5 Met. 478; Talman vs. Sparhawk, Id. 469.)

There is not a single element of estoppel in this case. The whole scheme of the plaintiff rests upon this hypothesis, viz: That O'Fallon thought Fry's fence was his west line; that he told Lucas so, and innocently *deceived him*; that Lucas and O'Fallon told the Finneys so, and located them on Lucas' land; that the Finneys enclosed so as to hold by actual possession from 1829 until this day; that Lucas did not enclose the land of the Lindells, which he erroneously supposed belonged to him; that the Finney fence remained from 1829 to 1845, a period of sixteen years, before the Lindells and Lucas discovered the true lines of the tracts described in the deeds under which the

parties claimed title ; that the Lindells then asserted their title according to their deeds, and recovered the land up to Finney's fence in October, 1852, and entered into possession, and have held the lot ever since by actual possession of their tenants.

I have not been able to find a case in the books, where a plaintiff has sought to recover land in ejectment upon an *estoppel in pais*, from a defendant holding the true title by deed and the possession to support it.

When the Lindells commenced their suit against the trespassers, in 1845, for all their land, up to Finney's fence, Lucas was bound to assert his rights against the Finneys, and his negligence in doing so until 1849, gives him no claim against the Lindells.

II. The rule is well settled, that one who is not bound by estoppel cannot take advantage of an estoppel. (*Lansing vs. Montgomery*, 2 Johns. 382 ; 8 Wend. 480 ; *Dezell vs. Odell*, 3 Hill, 221 ; *Jewett vs. Miller*, 10 N. Y., 6 Seld. 402 ; *Griffin vs. Richardson*, 11 Iredell, 439 ; *The Cohoes Co. vs. Goss*, 13 Barb. 137 ; *Hoffner vs. Noble*, 11 Ill. 531 ; *Wright vs. Hazen*, 24 Verm. 143.)

There is no mutuality in this case between the Lindells and Lucas or their heirs. Lucas did not claim in any way under the Lindells, made no agreement with them, and did no act to fix a boundary line for them. If the Lindells, in 1827, had enclosed the Lucas land in the western half of the tract, and had held it for any period short of twenty years, they could have been ejected by Lucas ; and there being no agreement between the parties in regard to the line or fence, the Lindells could not have claimed the benefit of an estoppel as against Lucas.

Lucas was bound to know his own lines, and the Lindells were under no obligation to fix them for him. But neither of the parties knew their true lines, and no representations were made on either side, and there can be no estoppel.

III. It has been held in many cases that the statute of frauds stood in the way of allowing the title to real estate to be affected by parol evidence at law, in regard to boundaries agreed upon without writing, and that relief could only be granted in a court of equity whenever the circumstances were such as to show

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actual fraud. (Parker vs. Barker, 2 Met. 421; Marshall vs. Pierce, 12 N. H. 127; The Mayor vs. Bolling, 3 Rand. 563; Denn vs. Baldwin, 1 Zabriskie, 395; Swick vs. Sears, 1 Hill, 18; Delaplaine vs. Hitchcock, 6 Hill, 17; McPherson vs. Walters, 16 Ala. 714; Day vs. Rowland, 17 Id. 681; 18 Id. 182; Walker vs. Murphy, 34 Id. 501.)

The weight of authority is now in favor of allowing an estoppel *in pais* arising from *fraud, concealment or misrepresentation* of title to land *to constitute a good defense in a court of law*. (Sayles vs. Smith, 12 Wend. 67; and cases cited in 2d vol. Smith's Leading Cases, ed. of 1866, p. 761.) But no authority can be found authorizing a party to sue the real owner at law, who is in possession of his land according to his deeds, and recover upon such an estoppel *in pais*, in ejectment or other form of real action. Such a case has never been heard of as this. It is said the Lindells did not assert their title and possession of this vacant space from the building of Finneys' fence in 1829 until 1845, a period of sixteen years; but they asserted their title and possession by an action of forcible entry and detainer, commenced in August, 1845, against trespassers, in which suit they recovered judgment, had execution, and were put into possession by the sheriff in October, 1852, and have continued in possession of the lot in suit ever since. The judgment and execution relate back to the commencement of the suit, and transfer the possession as of August, 1845, so that the Lindells and their heirs have had possession of the property in suit, and asserted claim to it, for twenty years prior to plaintiff's action of ejectment now pending. *

In every case cited in the books concerning the operation of an estoppel *in pais*, upon titles to real estate in ejectment, the party setting up the estoppel has been *in possession* and has invoked the equitable rule to defend his possession in an action at law.

Lucas never had any actual possessions of the vacant space prior to October, 1852; and although the Lindells' fence did not extend to the western limit of their tract, they held possession by construction of law of the whole tract described in their deeds, not in the actual adverse possession of other persons. (2d ed. Ang.

Lim., § 400, and cases cited; Elliot vs. Pearl, 10 Peters, 412, &c.)

IV. Where both parties knew the facts, or have the same means of knowledge, neither can have any claim to equitable relief against the other. (Comm. vs. Naulty, 10 Barr, 527, 531; Crest vs. Jack, 3 Watts, 238.)

In this case neither party knew the facts, and each party had the same means of knowledge, by procuring a survey to be made of the whole tract. The Lindells ascertained the truth of the matter in 1845, and promptly acted upon it, and Lucas would not act and did not claim possession then. There can be no estoppel *in pais* under the facts of this case to authorize a court to oust the real owner from his possession. (Parker vs. Barker, 2 Metc. 451; Talman vs. Sparhawk, 5 Metc. 469; Titus vs. Morse, 40 Maine, 348.)

It does not aid the claim of plaintiff that Lucas put the Finneys into possession of his land in 1829, without consulting the Lindells. If Lucas gave his land to the Finneys, and they improved it, it does not follow in law or in morals that the Lindells should surrender a part of their land to Lucas, unless some agreement to that effect can be shown.

The verbal declarations of the Lindells to persons having no interest in the land in suit have no effect upon the questions at issue. (Sullivan vs. Park, 33 Maine, 438; Quin vs. Brady, 8 Watts & S. 139; Medley vs. Williams, 7 Gill. & Johns. 31; Hamlin vs. Hamlin, 1 App. 141, and cases cited.)

V. The case of Lindell vs. McLaughlin, (30 Mo. 29,) has no bearing on this case. The facts assumed by the court in that case are not supported by the proof in this case, and the doctrine of equitable estoppel *in pais* in that case was declared upon a supposed acquiescence of the Lindells in the claim, acts of ownership and possession of Lucas for thirty years; and Lucas being in possession of a lot in the south arpent when suit was brought, the court held that the estoppel upon the assumed facts might operate to bar the action of ejectment. The case now presented is wholly different in all its material features. (See further

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and generally as applicable to appellant's case, *Davis vs. Davis*; 26 Cal. p. 38-9, in point fully; *Corkhill vs. Landers*, 44 Barb. 227-8, in point; *Wright vs. Douglass*, 10 Id. 97, in point; *Griffith vs. Beecher*, 10 Id. 432, in point; *Hazelton vs. Batchelder*, 44 N. H. 42; *Califf vs. Hillhouse*, 3 Min. 311, in point fully; *Piper vs. Gilmore*, 49 Maine, 153, in point; *Vasberg vs. Teater*, 32 N. Y. 568, in point; *Terry vs. Chandler*, 16 N. Y. 354, 367, in point; *Adams vs. Rockwell*, 16 Wend. 285, in point; *Danforth vs. Adams*, 29 Conn. 107; *Taylor vs. Ely*, 25 Conn. 250; *Preston vs. Mann*, Id. 118; see also *Smith's Lead. Cas.*, ed. of 1856, top p. 759-769.)

In the case of *Turner vs. Baker*, (42 Mo. 15) this court decided and showed clearly that there was no estoppel *in pais* in this case; that there was no evidence in the case to warrant it—that the Lindells had the possession from the 22d of October, 1852.

That decision of this court disposes of the case now presented upon the same facts.

Since that decision the plaintiff has introduced testimony showing that *Patterson* under *Lucas*, in 1854, took possession, and put *Hannegan* into the possession of the lot west of *Turner's* lot, and fenced the lot so as to leave about sixty feet of *Turner's* lot, now claimed by him, east of the *Hannegan* lot as fenced in by *Patterson* and his carpenter, *Wm. Fulton*. The *Turner* lot now sued for, was not fenced in by *Patterson*, except to the extent of ten or fifteen feet on the west end of the 75 feet claimed by *Turner*, under his deed from *Mrs. Hunt*, the daughter of *Lucas*. Defendants, since 1854, have been in actual possession of the lot sued for. Defendants also have a title to the whole lot sued for by a tax deed of 1866 or 1867 under the new tax law. See tax deed of State to *B. A. Hill*.

On the doctrine of estoppel as applicable to this case counsel further cited: *Martin vs. Zellerbach*, 38 Cal. 315 (1859); see also *Simpson vs. Pearson*, (1869) 31 Ind. 1; *McKenzie vs. Steele*, 18 Ohio St., 38 (1868); *Donaldson vs. Hall*, 2 Daly, [N. Y.] 325; *State vs. Pepper*, 31 Ind. 76 (1869); *Voorhies vs. Henshaw*, 30 Id. 488 (1868); *Lewis vs. Haywood*, 64 N. C. 83;

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Barker vs. Bell, 37 Ala. 359, 18 Id. 182; McPherson vs. Walters, 16 Ala. 714; 34 Id. 591; Corkhill vs. Lander, 44 Barb. 218; Rangely vs. Spring, 28 Me. 127; Warner vs. Fountain, 28 Wis. 412, a case in point; Junction R. R. vs. Warpold, 19 Ind. 350; Leland vs. Gasset, 17 Vt. 403; Wilson vs. Harwood, 23 Me. 131; Batchelder vs. Sanborn, 4 N. H. 474; Moore vs. Moore, 11 Humph. 433; Boggs vs. Merced Co., 14 Cal. 279; Woods vs. Wilson, 37 Penn. 379; McCracken vs. City San Francisco, 16 Cal. 626; Davis vs. Davis, 26 Cal. 41; Tilden vs. West, 8 Ired. 83; Royston vs. Hourie, 15 Ala. 309; Dixfield vs. Newton, 41 Me. 221; Taylor vs. Ely, 25 Conn. 250; McGarrity vs. Byington, 12 Cal. 426; Odlin vs. Gale, 41 N. Y. 465; McCafferty vs. Connover, 7 Ohio St. 99; Bowman vs. Cudworth, 31 Cal. 153; Carpenter vs. Stilwell, 11 N. Y. 61; Darlington's Appeal, 37 Penn. St. 430; Carpenter vs. Thurston, 24 Cal. 283; Knowlton vs. Smith, 36 Mo. 512; St. Louis University vs. McCune, 28 Mo. 484; Thomas vs. Babb, 45 Mo. 384; Dolde vs. Vodica, 49 Mo. 93; Adams vs. Rockwell, 16 Wend. 302, 303; Baldwin vs. Brown, 16 N. Y. 359; Reed vs. Farr, 35 N. Y. 113; Knowlton vs. Smith, 36 Mo. 507; 3 Washb. Real. Prop. 491-500; Barker vs. Bell, 37 Ala. 359; 18 Ala. 182; McPherson vs. Walter, 16 Ala. 714; 34 Ala. 591.

HOUGH, Judge, delivered the opinion of the court.

This was an action of ejectment, brought by the plaintiff against the defendant, in January, 1865, to recover possession of a lot of ground in the city of St. Louis, being part of what was known as the Clamorgan field lot, in the St. Louis common fields, and lying between Thirteenth and Fourteenth streets, on the north side of Washington avenue, with a front of seventy-five feet on said avenue, and a depth of one hundred and fifty feet.

The defendants pleaded not guilty and the statute of limitations.

This case was before this court on a former occasion, and the decision then rendered will be found reported in 42 Mo., 13. The case is one of disputed boundary, and the controversy grows out of the following facts:

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In the year 1821, Jeremiah Connor was the owner of a tract of land supposed to be forty arpents in length from east to west, and one in depth, which was confirmed to one Clamorgan; also another tract of the same dimensions adjoining it on the south, confirmed to one Bissonet, the two making, when taken together, a tract of 2x40 arpents.

On the 20th day of October, 1823, John O'Fallon bought of Connor, through the sheriff, the west half of the entire tract of 2x40 arpents.

On the 1st day of November, 1823, Peter and Jesse G. Lindell bought of Connor, through the sheriff, all that portion of the Clamorgan arpents lying west of Eleventh street, and bounded on the west by the tract bought by O'Fallon, being about 1.100 feet in length, east and west, and supposed to contain between five and six arpents.

On the 29th day of June, 1824, Jacob Fry bought of Connor, through the sheriff, all that portion of the Bissonet arpents lying west of Eleventh street, and bounded on the west by the tract purchased by O'Fallon, and on the north by the tract purchased by P. and J. G. Lindell.

The evidence tends to show that the tract purchased by Fry was surveyed and staked off before it was sold, and a stone set up at his southwest corner. This point was ascertained to be on the western line of Fry's purchase by marking off twenty arpents from the eastern extremity of the tract, it being supposed at that time that the entire tract was only forty arpents long. Fry immediately erected a fence on his western line thus ascertained, and that line was then and for a long time afterwards considered the center line of the 2x40 arpents.

On October 13, 1824, O'Fallon sold and conveyed to J. B. C. Lucas 1x2 arpents, that is, one arpent in the Clamorgan tract and one arpent immediately south of it on the Bissonet tract, the two being bounded on the east by the tracts purchased of Connor by P. and J. G. Lindell and Jacob Fry. The Fry tract was then enclosed and O'Fallon sold to Lucas by Fry's fence as his eastern boundary.

Fry died in 1824, and on the 8th day of May, 1827, the Lindells purchased of Fry's administrator, the tract purchased by Fry of Connor.

In 1828 or 1829, the Lindells fenced what they supposed to be the ground purchased by them of Connor, by continuing the Fry fence northward and enclosing the north line of the Clamorgan tract.

In 1827 or 1829, O'Fallon sold to John and William Finney ten arpents in the west half of this 2x40 arpents, bounding the tract, so sold, on the east by the two arpents sold to Lucas, and on July 9, 1831, executed to the Finneys a deed therefor. When the Finneys purchased they located their eastern line, and erected a fence thereon about one arpent west of the Fry fence, thus leaving an open space of 1x2 arpents between their fence and the line of the Fry fence, which was claimed by Lucas. In 1830 or 1831, the Finneys surveyed their ground and replaced this fence with a more permanent one. In September, 1825, O'Fallon sold twenty-eight arpents, which was supposed to be the entire remainder of his west half of the 2x40 arpents, to one Slater, and the eastern boundary of this tract was also determined by the location of the Fry fence. In 1832, or 1833, the Lindells made a more permanent fence of cedar posts and oak rails, locating it a short distance further west than the original fence. The vacant space between the fences of the Finneys and the Lindells was claimed by J. B. C. Lucas as his property, until his death in 1842, when Washington avenue was opened on the line dividing the Clamorgan and Bissonet tracts, and the fences of the Lindells fell down and gradually disappeared. With the knowledge of the Lindells, Lucas exercised at all times the authority of an owner over this space. He purposely kept it open for his own convenience, as an outlet to the north; guarded it against trespassers, pastured his cattle upon it, and protected its surface from washing. During all this time the Lindell fence was regarded by all parties as their western line. Lucas acquiesced in its location, adopted the same as his eastern line, and agreed to the location of the Finney's permanent fence one arpent west thereof, as his western line. Valuable improvements

were made by the Finneys on their grounds so located, prior to the opening of Washington avenue in 1842. About this latter date and prior thereto, the Lindells in conversation with the Finneys and others, repeatedly spoke of Lucas as the owner of this vacant space. At the date of the several conveyances above mentioned, these lands were of comparatively little value, and the parties interested were unwilling to undergo the expense of a survey of the entire tract, in order to determine with accuracy the boundaries of the several parts thereof purchased by them. In 1845, however, parties claiming under Clamorgan seized the whole of the land occupied by the Lindells in the Clamorgan tract, and also that claimed by Lucas in said tract, and enclosed the same up to Finney's fence. A full survey was then made by the Lindells of the entire tract of 2x40 arpents, and the tract being longer than was supposed, its center line was found to be, not at the line of the Fry and Lindell fences, but further west and several feet within the Finney enclosure.

The Lindells thereupon asserted title to the whole of the land in the Clamorgan tract from Eleventh street to the Finney fence, which included, of course, the north arpent of the 1x2 arpents claimed by Lucas. The lot in controversy lies on the east side of the north arpent claimed by J. B. C. Lucas, and the plaintiff claims under him. The defendant claims under the Lindells.

The Lindells sued the trespassers, claiming under Clamorgan, in forcible entry and detainer, and recovered judgment against them, and on the 22nd day of October, 1852, were put in possession by the sheriff of all the land lying between Eleventh street and the Finney fence, being about thirteen hundred and fifty feet from east to west. To this suit no one claiming under Lucas was a party. There was testimony tending to show that in the year 1854 the arpent claimed by Lucas in the Clamorgan tract was vacant, unoccupied and unenclosed, and the claimants under Lucas entered upon the same as owner and enclosed the entire arpent, except a small portion on the east side thereof which was marshy and partially covered with water, and held possession of the same for several years. This enclosure covered a portion of the land now in controversy. Conflicting testimony was intro-

duced by the respective parties as to the adverse occupancy of this arpent by the Lindells from the year 1852 until the institution of this suit, the details of which it is unnecessary to state.

In order to show an interruption of the possession relied on by the defendants under their plea of the statute of limitations, the plaintiff offered in evidence the record of an ejectment suit, instituted by the Lindells on the 19th day of February, 1856, against one Hannegan, to recover possession of the Clamorgan arpent, claimed by J. B. C. Lucas, the petition in which suit was sworn to by one of the plaintiffs. In that suit a representative of Lucas was admitted to defend.

At the October term, 1866, of the circuit court of St. Louis county, that suit was dismissed. Some time prior to that date, of course, the Lindells had regained the possession, as the present suit was instituted in 1865. The record was excluded by the court, and the plaintiffs excepted. On the 23rd of October, 1854, the plaintiff sold the property in controversy, and repurchased it in 1859.

The foregoing epitome of the facts will suffice to present the points in controversy. The plaintiff asked the court to give the following instructions, which were given or refused as marked:

No. 1. (Given). "The court instructs the jury that the deeds read in evidence by plaintiff, if true and genuine, vested a title to the land described in the deed of O'Fallon to Lucas in him, said Lucas, to be bounded on the east by Lindell's and the late Jacob Fry; and it was competent for said parties, or those claiming under them, to locate and fix the line between them without any survey thereof, and without any deed or writing, so as to be binding and conclusive upon them and all deriving title from or claiming under them or either of them."

No. 2. (Refused). "If the jury find from the evidence that about the year 1827 or 1828, said Lindells located their western line at a fence which they put up as their western boundary and John B. C. Lucas assented to said location, and located his land by said fence as his eastern boundary, and both said Lindells and Lucas for a series of years (it might be less than twenty) acquiesced in and considered said location correct, and lived up

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to it, and treated it as correct in the uses of their lands respectively, and until Lucas, on the faith thereof, had expended labor or money on said land so located as his, with the knowledge and acquiescence of said Lindells, and until other persons acquiring titles from O'Fallon west of Lucas, located their lands on the faith of the correctness of said western line of Lindells, and expended labor or money on the same, believing these locations correct, such facts, if the jury find them to be facts, constitute in law a valid, conclusive establishment of the said line between said Lucas and Lindells and those claiming under them, anything in the deeds read in evidence to the contrary notwithstanding. And if the jury find the facts to be as set forth above, and that the premises in dispute lie within the tract conveyed by O'Fallon to John B. C. Lucas, and so located by said Lucas and Lindells, then they are instructed that defendants have no defense to this action unless under the statute of limitations."

No. 3. (Given). "The court instructs the jury that defendants can make out no defense under the statute of limitations, unless it has been shown by the evidence that they, and those under whom they claim, have had an actual, exclusive, unbroken and notorious possession of the land in dispute for a whole period of ten years prior to the commencement of this suit and subsequent to February 2nd, 1847."

No. 4. (Refused.) "The Court instructs the jury, if they find from the evidence that prior to October 23, 1854, the plaintiff claiming under the deed to him from Hunt and others, read in evidence, together with Henry L. Patterson and Wm. Fulton, claiming adversely to the Lindells, peaceably entered on the premises in dispute and enclosed the same or part thereof by a fence, Patterson and Fulton, or either of them, acting for themselves and plaintiff, and after said entry and fencing one John Hannegan was peaceably in possession of the land so fenced, as tenant of Patterson and Fulton, or either of them, so acting for plaintiff and themselves, or such as claimed under them; and said Hannegan, while so in possession denied the right and title of said Lindells, and continued in possession from 1853 and 1854 to some time in 1856, all which said Lindells knew, the jury will

find against the defendants on their plea of limitations as to so much of the premises in dispute as was embraced in said possession of Hannegan. And as to the part not embraced in said Hannegan's possession, they will find against defendants on their plea of limitations, unless it has been shown to the satisfaction of the jury that defendants and those under whom they claim, have had a continuous, actual, notorious, unbroken possession thereof for a period of ten years prior to the commencement of this suit."

No. 5. (Refused.) "The Court instructs the jury if they find from the evidence that prior to October 23d, 1854, the plaintiff claiming under the deed to him from Hunt and others read in evidence, with Henry L. Patterson and Wm. Fulton claiming adversely to Lindell, peaceably entered on the premises in dispute, and enclosed the same or part thereof, by a fence, said Patterson and Fulton, acting for plaintiff and themselves, and after such entry and fencing, one John Hannegan was in peaceable possession of the land so fenced, as tenant of said Patterson and Fulton, or either of them, acting for themselves and plaintiff or such as claimed under him, and at the time of such entry and fencing, neither said Lindells or any one claiming under them, had actual possession of any part of the premises in dispute, and said Hannegan as such tenant so continued in possession from 1854 to some time in 1856, and his possession was adverse to said Lindells, and the jury find that that part of the premises in dispute not in possession of said Hannegan, if any, lay open and vacant in 1856 or 1857, or not in actual possession of defendants or those under whom they claim, they will find against defendants on their plea of limitations."

No. 6. (Given.) "The Court instructs the jury if they find from the evidence that one Patrick Hannegan was about the years 1856, 1857, 1858 or 1859, in peaceable possession of the premises in dispute, or any part thereof, as tenant of Henry L. Patterson, Wm. Fulton or either of them, acting for themselves and plaintiff, or such as claimed under him, and said possession of Patrick Hannegan was exclusive, and adverse to Lindells or those claiming under them, and so continued for several years, and that the part of the premises in dispute not so possessed by Patrick

Hannegan, if any, lay vacant and not in actual possession of Lindells or those claiming under them in 1856, 1857, 1858 or 1859, the defendants cannot avail themselves of their plea of limitation as to said part."

No. 7. (Refused.) "The Court instructs the jury that in order to defeat the plaintiff's action by limitation, the evidence must show to their satisfaction, a continuous, notorious, actual possession in defendants, and those under whom they claim, of the whole premises in dispute for a full period of 10 years, prior to commencement of this suit, and subsequent to February 2, 1847, and no such defense can be made out, if the jury find that during such period of 10 years any interruption of defendant's alleged possession occurred, either by a tenant of plaintiff being in possession adversely to defendants, or those under whom they claim, or by defendants, or those under whom they claim, being out of possession."

No. 8. (Given.) "The Court instructs the jury if they find for plaintiff, he is entitled to recover as damages, the reasonable rents and profits of the premises in dispute, from the commencement of this suit to the time of the verdict; also the monthly value thereof in future, and in addition such reasonable rents and profits, prior to the commencement of the suit during the time, as they shall find defendants have been in possession of, with the knowledge of plaintiff's claim, not to exceed five years before the commencement of the suit."

No. 9. (Refused.) "The plaintiff moves to instruct the jury if Lindells, or those claiming under them, employed a man to watch the grounds under dispute and warn off trespassers, and such man did watch the grounds and warn off trespassers, such facts merely constitute no evidence of possession in Lindells or those claiming under them, the ground in dispute."

The court gave the following instructions for defendants:

No. 10. (Given.) "The deed from O'Fallon to Lucas, October 13, 1824, read in evidence by the plaintiff to the jury on this trial, did not, at the time it was made, and does not now, so operate as to convey to the said Lucas any land situated within the eastern half of the general tract of 2x40 arpents of land, which

did belong to J. Connor, under whom both parties to this suit now claim title; and if the jury find from the evidence that the premises now sued for are situated within the eastern half of said general tract of 2x40 arpents of land, then plaintiff has shown no title to the land sued for, by said deed to Lucas of 1824, or by virtue of any other deed read in evidence in this cause."

No. 11. (Given.) "The deeds and conveyances given in evidence in this case by defendant show a good, legal title in the legal representatives of Peter and J. G. Lindell to all the land within the east half of the general tract of 2x40 arpents of land, which did belong to J. Connor, under whom both parties claim title.

No. 12. (Given.) "If the jury find from the evidence that defendants and those under whom they claim title or possession have had and held open, notorious, continuous and adverse possession of the premises in question now sued for, claiming to own the same for a period of ten years next before the commencement of this suit, the jury will find a verdict for defendants *and so say in their verdict.*"

No. 13. (Given.) "The deeds and conveyances given in evidence by defendants, if they be true and genuine, show a good, legal title in the legal representative of Peter and Jesse G. Lindell, to all land in the east half of the general tract of 2x40 arpents which did belong to Connor, under whom both parties claimed title, which lies west of Eleventh street."

No. 14. (Given.) "If the jury find from the evidence that the agent of Peter and J. G. Lindell was put into possession of the land lying between Eleventh Street and Finney's east fence, and Washington Avenue and Christy Avenue, October 22d, 1852, by virtue of a writ of execution issued in the case of forcible entry and detainer in favor of P. and J. G. Lindell vs. Charles Paynter and others, and said P. and J. G. Lindell, by their agent, received possession of said premises from said sheriff, and continued to exercise acts of ownership over said premises for ten years next after said 22d day of October, 1852, or for ten years continuously next before the day of commencement of this suit; and if the jury further find that no other person besides said P. and J. G. Lindell, their tenants, heirs or devisees, were in

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actual possession of the premises sued for in this action within ten years next before the commencement of this suit, then plaintiff cannot recover in this action."

No. 15. (Given.) "In order for the plaintiff to claim the benefit of an estoppel to pass the title of the land of P. and J. G. Lindell, the jury must find from the evidence that the Lindells acquiesced in a boundary line for twenty years prior to the 2d of February, 1847, and for ten years since that date."

There was a verdict and judgment for the defendants, which was affirmed at the general term, and plaintiff has appealed to this court.

It will be seen from the foregoing statement that the plaintiff claims title to the lot in controversy by virtue of an alleged estoppel *in pais* as to the location of the eastern boundary of the 1x2 arpents, originating in favor of J. B. C. Lucas, under whom he claims, and against P. and J. G. Lindell, under whom the defendants claim.

This being an action of ejectment, the question which meets us at the threshold of our inquiry is, whether ejectment can in any case be maintained upon a right acquired by estoppel *in pais* in cases of disputed boundary. In other words, does an estoppel *in pais*, in cases of disputed boundary, create a legal or merely an equitable right to the real property affected by it?

Although the general principles by which we are to determine whether an estoppel *in pais* has arisen in any given case are the same, whether the property affected thereby be real or personal, yet, as the statute of frauds has been made the corner stone of every argument against the transfer by estoppel of a legal estate in real property, in determining the question presented it will be proper to exclude from our consideration those cases involving only the title to personal property, and such legal rights and interests as are not required to be evidenced by deed.

Nor will it be necessary to consider any of the numerous cases to be found in the books, affecting real property, which do not relate to the adjustment of disputed boundaries. The rule in cases of disputed boundary is based upon considerations peculiar to those cases.

The authorities are clear to the effect that if one having the legal title to land, induce another to purchase the same from one who has no title, the legal title will not thereby pass to the purchaser, although the legal owner will not be permitted afterwards to assert his title against such purchaser. Where equitable defenses are not allowed in actions at law, the purchaser may have to appeal to a court of equity.

But where one has the legal title to the subject matter of a grant, the location or boundaries of which are doubtful or unascertained, and such person and the proprietor of a coterminous estate mentioned in the grant, establish and maintain their common boundary under such circumstances as will constitute a binding and conclusive identification of the subject matter of the grant, an entirely different case is presented.

In a recent and able opinion by Judge Cooley, (*Hayes vs. Livingston*, Cent. L. J. vol. 3. p. 692) in which the leading authorities on this subject are reviewed and classified, the doctrine is advanced that the title to real property cannot in any case be passed by estoppel. Reference is there made to the cases in which the doctrine of estoppel has been applied to the voluntary adjustment of boundaries between contiguous estates, and those cases are distinguished by Judge Cooley from the cases cited to support the rule announced by him, on the ground that "it is not supposed that in such cases the title is affected; the parties have only, by their agreement and conduct, determined the limits of their respective ownerships."

We cannot readily accept the foregoing ground of distinction as entirely satisfactory, if, as Judge Cooley seems to concede, such voluntary adjustment of boundary lines is really effectual for the purpose of ascertaining and defining the subject matter of a grant.

While it is true, that in such cases the parties have "by their agreement and conduct, determined the limits of their respective ownerships;" yet it is also true that if the boundary agreed upon is not, in point of fact, the true boundary, the title must, to the extent of the discrepancy between the two, necessarily be affected. That is to say, the limits within which it is operative to confer

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a right, will be enlarged or restricted, according to the agreement of the parties. In *Baldwin vs. Brown*, (16 N. Y. 363) it was said that "it seems impossible to hold that a mere parol agreement, adopting a line different from that described in the deed, is obligatory, without violating the statute of frauds, both in its letter and spirit. It is said in some of the cases, by way of sustaining the doctrine, that the agreement does not transfer the title, but simply determines the boundaries of the land described; a distinction, the soundness of which may well be doubted. The supposition of such an agreement, in cases of long acquiescence in an established line, is as I apprehend, entirely superfluous. The acquiescence in such cases affords ground, not merely for an inference of fact to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature, that the party is precluded from offering any evidence to the contrary."

In this case it is quite apparent that a legal fiction is invoked, which practically extends the title to the established line, and at the same time avoids the intervention of the statute of frauds, which it is supposed would otherwise prevent such extension of the title. The necessary consequence however, of both of these decisions, which on this point are representative and not exceptional cases, is that the title conveyed extends to all the land included within the boundaries ascertained and fixed by the agreement of the parties in the one case, and by location and acquiescence in the other. If the boundary so fixed is to be conclusively regarded as the true boundary, of course the legal title must cover all the land within such boundary. (*Vasberg vs. Teater*, 32 N. Y. 568.)

This question was thoroughly examined by this court many years ago (*Taylor vs. Zepp*, 14 Mo. 482; *Blair vs. Smith*, 16 Mo. 273), and the conclusion was then reached, both upon principle and authority, that when the proprietors of contiguous estates, the boundaries of which are indefinite and unascertained, agree upon the line dividing their estates, the calls in their respective deeds, fasten themselves upon the property to which they are thus applied, and the title passed by the conveyances covers and in-

cludes every part of the property so identified as being comprehended within the description contained in the grant.

In the case of *Taylor vs. Zepp*, *supra*, as in the case at bar, the boundary was not fixed in the deed by monuments, courses and distances, and a boundary fixed by the agreement and acts of the parties was held to be conclusive. Judge Napton, who delivered the opinion of the court, used the following language: "It is said that this doctrine conflicts with the statute of frauds, but it has not been so regarded in any of the numerous cases decided on this point. Where the terms of the deed are ambiguous, there is clearly no ground upon which the statute of frauds can be invoked; but even where a well defined boundary is given in the deed, we have seen that a different one may be established under circumstances which will conclude the parties from contesting it. This is only analogous to numerous other doctrines, as well settled as the construction of the statute itself. Is not a title itself held to pass by estoppel? Have not the courts refused to permit the contents of a deed to be proved, when the grantee has destroyed it with a view to reinvest the title? *Have not the owners of land transferred their title by standing by and permitting adverse possession, and the adverse proprietors to build and improve?* The statute was made to prevent fraud, and the courts have not felt themselves called upon to adhere so closely to its letter as to facilitate and encourage the very evil it was framed to prevent. *The truth is, the statute does not apply to such cases.* The doctrine of estoppel is as old as the statute of frauds, and, as such, a part of the law of the land. It is no objection to either, that the one may be a modification or regulation (?) of the other."

In the case of *Blair vs. Smith*, *supra*, the rule laid down in *Taylor vs. Zepp* was followed and approved, and the following language was employed in giving expression to the opinions of the court: "The statute of frauds does not touch such a case as this. *Here there is no sale of land to either party. There is no consideration passing from one to the other; it is not a contract either of buying or selling land from one to the other.* They own adjacent lots—contiguous lots; they agree

that such a marked line shall be the dividing line between the lots which they own; and they use and occupy the respective lots up to this line, not for twenty years, not for fifteen years, but for a length of time sufficient to show the understanding and the intention of themselves—to show that they know their own boundary, that they are content with their own boundary. * * *

“Now, this use and occupancy without disturbance, for a time, long enough for men to show that they know the boundary between their lands, shall be considered binding and conclusive as to such boundaries, as well as of such understanding or agreement between them.

“They shall not, after a lapse of years, longer or shorter, as the circumstances may tend to show their agreement or settlement or the fixing of their common boundary, be permitted afterwards to dispute it. *Such boundary, thus agreed upon shall be considered the true one; and each one considered as the owner of the land mentioned in his deed thus marked out to that boundary between them:*” See, also, *Boyd vs. Grayes*, 4 Wheat. 513; *Heirs of Hunton vs. Mathews*, 1 Yerger, 118; *Lewellen vs. Overton*, 9 Humph. 76, which assert the same doctrine.

The reason of the rule thus established must, of course, confine its operation to cases of disputed or uncertain boundary. In all cases where the location of the true boundary is known to the proprietors of coterminous estates, and they attempt for mutual convenience or other sufficient reason to transfer land from one to the other by a parol agreement, changing the location of such boundary, the statute of frauds will inflexibly apply. (*Nichols vs. Lyttle*, 4 Yerger, 456; *Gilchrist vs. McGee*, 9 Yerger, 455; *Garborough vs. Abernathy*, 1 Meigs, 413; *Vasberg vs. Teater*, 32 N. Y. 568.)

We do not hesitate to hold, therefore, that where a disputed or uncertain boundary line has been conclusively settled by parol agreement, ejectment may be maintained for all the land included within the call of the deed, as located and determined by the agreement and conduct of the parties fixing the boundary; and it

has been so held in the case of *Speers vs. Walker*, 1 Head, (Tenn.) 166; *Tarrant vs. Terry*, 1 Bay (So. Car.) 239.

The question next to be considered is whether there was any testimony from which the jury would have been authorized to find or infer the existence of an agreement between Lucas and the Lindells, establishing their common boundary at the line of the Fry and Lindell fences. There can be no question, we think, but that the boundaries called for in the conveyances were of that nature that they might properly be made the subject of voluntary adjustment by the parties.

As stated in *Taylor vs. Zepp*, *supra*, it has been held that they may be so adjusted even when the boundary is defined in the deed by courses and distances. Lucas and the Lindells were all dead when this cause was tried, and no testimony was introduced to show any *express agreement* between the parties as to their common boundary. But there can be no controversy about the fact that the Lindells did in 1828 or 1829 erect a fence on what they supposed to be their western line. Nor can there be any controversy about the fact that Lucas, regarding this location made by the Lindells to be correct, acquiesced in the same, and agreed to the survey made by the Finneys in 1832-3, and the location of their permanent fence made in accordance therewith, fixing their eastern and his western line. The further fact is not disputed, that the area originally left between the Finney fence and the Lindells, was slightly in excess of the arpent, and that when the Lindells erected their permanent fence in 1832-3, they located it a few feet west of the fence first erected by them, thereby reducing the open space between their fence and the Finney fence to one arpent in width, the amount claimed by Lucas. It is not denied that Lucas, from the date of his deed, in 1824, to the day of his death, in 1842, with the knowledge of the Lindells, exercised acts of ownership over this vacant space, and claimed it as his own. He protected it against trespassers, pastured his cattle upon it, improved its surface, and paid taxes upon it. And there was evidence to the effect that one of the Lindells being upon the land, declared Lucas to be the owner of it, and

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stated that he had tried to buy it, but could not. Lucas kept his ground vacant as a "look-out" to the north, and as a means of egress northward to the St. Charles road from his residence, which was immediately south of it. It is not denied that the Lindells, prior to their discovery, in 1845, that the line of their western fence was not in fact the true line, constantly recognized this arpent to be the property of Lucas, and did, on various occasions, and to various persons, so declare themselves.

It is strenuously contended, however, on behalf of the defendant, that as the location of the Lindells' west line was made by them in ignorance of their true boundary, they were not guilty of any fraud, concealment, or willful misrepresentation, intended to deceive Lucas, and by which he was deceived and misled to his injury, and that therefore they are not estopped from claiming to their true line.

This is not a case involving the general doctrine of estoppel, so ably and learnedly discussed by the distinguished counsel for the defendant, and if it were, we should be disposed to take issue with his statement of the law on that subject. The rigid rule laid down in *Pickard vs. Sears*, 6 Ad. & El. 469; *Boggs vs. Merced Mining Company*, 14 Cal. 279, and kindred cases, has been somewhat qualified by more recent adjudications. But the question here is, whether the testimony relating to the practical location of the boundary lines between Lucas and the Lindells, in 1828 or 1829, and their acquiescence in the same for a period of nearly seventeen years, together with the declarations and conduct of the parties in reference thereto, was sufficient to warrant the jury in inferring therefrom an agreement between the parties establishing such line. We think it was.

In *Rockwell vs. Adams*, (7 Cowen, 761) Sutherland J., said: "Now I apprehend that it is not necessary, in order to make an actual practical location control the courses and distances in a deed, that the party making such location, or subsequently recognizing it, should in all cases know that the effect of it would be to give him less land than he would otherwise be entitled to, nor that there should be an *express agreement* to abide by such line. An acquiescence for a length of time is evidence of such

agreement. When the line has been acquiesced in for a great number of years by all the parties interested, it is conclusive evidence of an agreement to that line."

In *Baldwin vs. Brown*, (16 N. Y. *supra*) it was held that such acquiescence was conclusive evidence, not of an agreement, but that the boundary fixed was the true boundary. This, as we have before seen, was upon the theory that no valid parol agreement could be made in such cases—a doctrine which does not obtain in this State.

In *Dibble vs. Rogers*, (13 Wend. 539,) referring to the charge of the judge to the jury in the trial court, it was said: "He instructed them that a long acquiescence in an erroneous location by the plaintiff, would authorize them to find that the plaintiff had agreed to a location different from that given by his deed; and whether he knew his rights or not, such location or acquiescence would conclude him; and if the jury were satisfied that the plaintiff had agreed to such a location, (of which his long acquiescence in the location contended for by the defendant was evidence) that they would find for the defendants, otherwise for the plaintiff. This is the rule of law laid down by this court in *Rockwell vs. Adams*, (7 Cowen, 762;) and again, after a second argument, in the same case in 6 Wend. 467. It is believed that the authorities referred to in those cases fully sustain the principle. (See 1 Caines, 363; 3 Johns. R. 8, 269; 7 Id. 245 per Van Ness J.; 8 Id. 367; 9 Id. 100; 17 Id. 29.) It has again been recognized in the recent case of *McCormick vs. Barnum*, 10 Wend. 104; and in *Kepp vs. Norton*, 12 Wend. 130. The acquiescence in those cases varied from the period of 17 to 40 years. In this case it was about twenty years. Those cases also show that the *acts* and *declarations* of the parties are competent evidence upon the question of location."

In *Jackson vs. McConnel*, (19 Wend. 176,) it was held that acquiescence was evidence of an agreement, but not conclusive evidence unless continued for a great number of years. The rule announced in the foregoing cases was approved in *Blair vs. Smith*, *supra*, and *Taylor vs. Zepp*, *supra*.

It follows from the foregoing authorities, that defendants' instructions number 10, 11, 13 and 15, should not have been given. Plaintiffs' instruction number 2 needs some modification to make it conform to the views expressed in this opinion.

We will now proceed to consider the action of the court below in giving and refusing instructions on the subject of adverse possession. If it be considered that there was a binding and conclusive establishment of the boundary line between Lucas and the Lindells, the effect of which was to apply the calls in Lucas' deed to the property in controversy, it is clear that when the trespassers claiming under Clamorgan took possession of the land between Lindell's and Finney's fence, as to that land Lucas was disseized and not the Lindells.

A recovery by the Lindells in the action of forcible entry and detainer against the trespassers, could not of itself affect Lucas' title to this arpent. No such effect is claimed for the judgment in that case. But it is very confidently asserted that the judgment rendered therein when executed by a writ of *habere facias possessionem* in 1852 related to the institution of the suit in 1845, and by operation of law made the possession of the trespassers during the intervening time the possession of the Lindells.

We are not prepared to admit that the doctrine of relation can be invoked under such circumstances, for the purpose of creating a constructive, adverse possession.

But it is wholly immaterial in view of the testimony on the subject, whether the adverse possession of the Lindells is dated from the time when they took possession under the writ of execution in 1852, or from the institution of the suit in 1845. In order to divest the title of Lucas, the Lindells must have had ten years' continuous, adverse possession after February 2d, 1847, the date of the act fixing a limitation of ten years in action for real property, and before the 7th day of January, 1865, the date when the present suit was instituted. If the jury should believe the testimony tending to show that the claimants under Lucas were in possession during the years 1854, 1855 and 1856, or that the claimants under the Lindells were during said years out

of possession, and the premises were open and vacant, the defense of the statute of limitations must necessarily fail.

Unless the defendants, or those under whom they claim, were in possession in the year 1856, it is arithmetically impossible that there could be a continuous, adverse possession for ten years, between the 2d day of February, 1847, and the 7th day of January, 1865. If the premises were vacant, the constructive possession would of course follow the true title; and if by an agreement between Lucas and the Lindells, fixing the boundary line, the title was in Lucas' representatives, and such title had not been divested by ten years' adverse possession, then the constructive possession, while the premises were so vacant, was in them. So that when the Lindells regained the possession, before the institution of the present suit, they could not claim, as any portion of their adverse occupancy, that period during which the representatives of Lucas were in the actual or constructive possession of the premises sued for.

We are of the opinion, therefore, that the fourth and fifth instructions asked by the plaintiff, and refused by the court, should have been given. The seventh instruction had been substantially given in the third. Defendant's instruction numbered fourteen was defective in leaving it to the jury to determine what acts of ownership will amount to adverse possession.

In regard to the record of the ejectment suit instituted by the Lindells in 1856, which was offered in evidence and was rejected by the court, we are of the opinion that it should have been admitted especially in view of the testimony that Hannegan, the defendant therein, had entered and was holding under the representatives of Lucas.

The petition in that case being sworn to under the law then in force, by one of the Lindells, amounted to a solemn admission that the Lindells were at that time out of possession. It necessarily follows that the judgment of the circuit court, both at general and special term, must be reversed and the cause remanded for a new trial.

Judges Napton and Sherwood concur. Judges Norton and Henry were not on the bench when this case was argued.

Baffington v. The Atlantic & Pacific R. R. Co.

WILLIAM S. BUFFINGTON, Respondent, *vs.* THE ATLANTIC & PACIFIC R. R. Co., Appellant.

1. *Damages—Railroads—Defects in machinery and track—Allegata and probata.*—Where an action for damages against a railroad is grounded on an alleged defect in construction of the engine, plaintiff cannot recover for an injury resulting from a defect in the track.

Appeal from St. Louis Circuit Court.

J. N. Litton, for Appellant.

Cline, Jamison & Day, for Respondent.

HOUGH, Judge, delivered the opinion of the court.

The plaintiff was a brakeman on the Kirkwood accommodation train, a passenger train of the defendant running between St. Louis and Kirkwood, and while engaged in the line of his duty had his arm crushed in coupling the engine to the baggage car.

The petition alleged in substance that the injury was occasioned by the defective and negligent construction of the engine; that its coupling apparatus, instead of being on a plane with the coupling apparatus of the baggage car, was so high that when the engine and car were brought together, the buffer of the engine did not strike the buffer of the car as it should, but passed over the same and above the platform of the car, so that a projecting timber attached to the tender of the locomotive, and called the "deadwood," was brought in contact with the platform of the car, and caught and crushed the plaintiff's arm.

The answer denied all the allegations of negligence in the petition, and averred that the injuries received by the plaintiff resulted from his own carelessness and unskillfulness.

There was a verdict and judgment for the plaintiff which was affirmed at General Term, and the defendant has appealed.

The testimony tended to show that the engine in question was an old one which had been "rebuilt," and, as in all new or "rebuilt" engines, the coupling apparatus was about an inch and a half higher than that of engines or cars which have been in use for a time, and was purposely so constructed with a view to the flexion of the springs resulting from use.

Two pieces of timber called "deadwood" were attached to the end of the tender and projected beyond it about eight inches; fastened to the ends of this "deadwood" was a circular buffer made of iron, which extended about eight inches beyond the ends of the "deadwood;" this buffer was intended to strike against another buffer attached to the end of the platform of the baggage car, when the car and tender were brought together, thus leaving a space of sixteen inches between the tender and car, on either side of the buffers and "deadwood," in which the plaintiff could stand while making the coupling.

The plaintiff was injured at Kirkwood while engaged in coupling the engine and tender to the baggage car, on a side track. At the time of the injury he was standing between the rails and near the south side of the track with his face toward the engine, which was being backed from the east, westward to the baggage car, holding the pin in his right hand and the link in his left, ready to drop the pin into the link when the engine and car came together. While in this position, the upper portion of his left arm being between the "deadwood" of the tender and the platform of the car, the buffer of the engine or tender passed over the platform of the car, bringing the end of the "deadwood" against the platform, catching and crushing the plaintiff's arm between them.

There was testimony tending to show that there was a sag or defect in the track, where the engine and car came together at the time of the injury, by reason of which the tender stood higher, and the car lower, than they would have relatively stood on the main track, or on a level track; that on the main track the buffer of the engine, which had a perpendicular surface of about eight inches, projected above the buffer of the baggage car about an inch and a half, so that they touched six and a half inches, and could not pass each other.

There was testimony also that the buffer of the engine would pass over the buffer of the baggage car when the engine and car were on the main track. One witness stated that the only reason he saw for the accident was, that the baggage car stood in a sag and the plaintiff missed the coupling. The plaintiff stated

that he had been frequently warned to be careful in making couplings, and the testimony was conflicting as to the care exercised by him at the time he was injured.

The instructions given by the court fairly submitted the question of plaintiff's negligence to the jury, and the measure of damages was properly declared.

The only material error that we have discovered in the record was the refusal of the court to give the following instruction asked by the defendant: "If the jury believe from the evidence that there was a depression in the track at the place where the coupling was being made, and that the accident happened by reason of the depression, and if the depression had not existed the accident would not have happened, then they will find for the defendant."

The plaintiff grounded his action on an alleged defect in the construction of the engine, and he could only recover for an injury resulting from such defect. If the cause of the injury was a defect in the track, and not a defect in the construction of the engine, he could not, without amending his petition, recover for a defect in the track. It is true the testimony was conflicting as to whether the buffer of the engine and the buffer of the baggage car would strike each other on a level track, but that was a question for the jury. If it distinctly appeared that the buffer of the engine would have passed over the buffer of the car, even had there been no depression in the track, the instruction would have been properly refused on the ground that there was no testimony to support it. But such was not the case. There was testimony from which the jury might have found that the depression in the track was the sole cause of the injury, and that question should have been submitted to them.

The judgment of the Circuit Court at the General and Special Term will therefore be reversed, and the cause remanded. The other judges concur.

Clore v. Graham.

JOSIAH CLORE, Plaintiff in Error, vs. ROBERT M. GRAHAM, Defendant in Error.

1. *Conveyances*—"Grant, bargain and sell"—*Covenant implied by words, made on behalf of those holding subordinatedly and not adversely*—*What holding adverse*.—B having purchased of A. certain land without at the time receiving a deed, took possession and made lasting improvements; and having incumbered the land, subsequently sold it to C; at date of which sale, on request of B. and with consent of C., and solely for their convenience, A. made to C. a deed in fee which contained the usual words "grant, bargain and sell." C. having been compelled to pay off the mortgage sued A. on his covenant against incumbrances implied in the above words. *Held*, that "all claiming under him" against incumbrances, by whom the grantor covenants to, under the statute, (Wagn. Stat., 274, § 8) in the words "grant, bargain and sell," referred to those holding subordinatedly and not adversely to the grantor; that B. although deriving title to the land from A. did not claim under him, but being in equity the owner of the land and entitled to a deed from A. held adversely to him (See *Ridgeway vs. Holliday*, 59 Mo. 444); that the intention of A. manifestly was to transfer to C. the title which he had obligated himself to make to B., and the intention and effect of his deed was not to covenant against the acts of B.
2. *Conveyances*—*Covenant against incumbrances*—*Notice to and knowledge of covenantee no discharge to covenantor, when*.—The maker of a covenant against incumbrances is not relieved from liability for such as are covered by the covenant, by the constructive notice imparted by the record to the covenantee, nor by actual knowledge on his part at the date of deed.

*Error to Daviess County Circuit Court.**Conover & Hicklin*, for Plaintiff in Error.

I. The evidence objected to by the plaintiff, offered by defendant to prove that there was no consideration, was illegal and incompetent. (13 Mo. 151; 1 Greenl. Ev. §§ 24, 25 and 26.)

II. The covenant against incumbrances runs with the land.

III. The fact that the plaintiff had made no contract with defendant about the land will not release defendant from liability on his covenants. (Rawle Cov., [3d. ed.] pp. 69, 70, and note 1, p. 462; *Byrnes vs. Rich*, 5 Gray, 518.)

IV. In order to bind the promiser (the defendant) it is not necessary that the consideration for the promise should have moved from plaintiff. (*Rogers vs. Gosnell*, 58 Mo. 589; *Myers vs. Lowell*, 44 Mo. 328; *Rogers vs. Gosnell*, 51 Mo. 466.)

L. T. Collier, for Defendant in Error.

I. The deed from Graham to Clore was procured by fraud and concealment on the part of Froman, and was executed by Graham in ignorance of the mortgage to Daviess County.

II. Although Clore knew nothing of said mortgage until after his purchase from Froman, and the execution of the deed by Graham, still, he should be regarded as affected with notice of Froman's fraud and will be bound thereby. Where one of two innocent parties must suffer, he must bear the loss who causes the injury.

III. Although it may appear from the deed in evidence that Clore is Graham's vendee, yet the petition admits that Froman was really the vendee of Graham, and Clore the vendee of Froman. And in the light of equity and the facts in the case, Clore is really and in fact the assignee of Froman, and as such, has no right to recover herein for the reason that a covenant against incumbrances does not run with the land.

IV. The deed from Graham to Clore is wholly unsupported by any consideration paid by the latter to said Graham, and appellant should look to his vendor for any loss he may have sustained by reason of Froman's fraud.

HUGH, Judge, delivered the opinion of the court.

In the Spring of 1867, the defendant, Graham, sold certain lands in Daviess County to one Froman, who, without receiving any deed therefor, entered at once into the possession thereof, paid the purchase money and made lasting and valuable improvements.

On the 20th day of August, 1867, Froman mortgaged a portion of said lands to Daviess County to secure a note for three hundred dollars, which mortgage was duly recorded on the succeeding day.

On or about the 22d day of November, 1869, the plaintiff Clore bought said lands from Froman and paid him therefor. On the same day, the defendant Graham, not yet having made a deed to Froman, at the request of Froman and with the consent of the plaintiff, and solely for their convenience, executed and delivered directly to the plaintiff a deed in fee, which contained in the granting clause, the words "grant, bargain and sell." Froman

having failed to pay his debt to the county of Daviess, the plaintiff in August, 1873, paid the same, and thereupon brought the present suit against the defendant, for a breach of the covenant against incumbrances implied in the words "grant, bargain and sell." Neither the plaintiff nor defendant knew anything of the mortgage at the time of the conveyance.

On this state of facts the circuit court held that the plaintiff could not recover, and he has brought the case here by writ of error.

It is provided by our statute that the words "grant" "bargain," "sell," in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained in express terms, be construed to be express covenants, "First, that the grantor was, at the time of the execution of such conveyance, seized of indefeasible estate, in fee simple, in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrance done or suffered by the grantor, *or any person claiming under him*; third, for further assurance of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns," which covenant may be sued upon as if expressly inserted in the conveyance.

Whether the plaintiff has a right of action depends upon the construction to be given to the covenant against incumbrances. He claims a right of action under the last clause of that covenant.

In considering this question it may be useful, as well as interesting, to present a summary of the legislation on this subject. In the statute of 6 Anne C. 35, § 30, which first gave the effect of specific covenants to the words "grant," "bargain" and "sell;" and to which our statute is plainly traceable, the following language was employed after the covenant of seizin: "Free from all incumbrances (rent and services due to the lord of the fee only excepted) and for quiet enjoyment thereof against the bargainor, his heirs and assigns, *and all claiming under him*; and also for further assurance thereof to be made by the bargainor, his heirs and assigns, *and all claiming under him*," etc.

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In 1715 this section was substantially adopted in Pennsylvania, omitting, however, the covenant for further assurances, and expressing the covenant against incumbrances in the following language: "Freed from incumbrances done or suffered from the grantor (excepting the rents and services due to the lord of the fee)." The Pennsylvania statute was adopted for the territory of Indiana in 1804, and in the same year it was enacted by the governor and judges of that territory, for the district of Louisiana, the words "due to the lord of the fee" being replaced by other appropriate words. (Territorial Laws Mo., Vol. 1, p. 46.)

In the Revised Statutes of 1825, the covenant against incumbrances was in the following form: "Free from incumbrances done or suffered from the bargainor or grantor, *his heirs and assigns*, and all claiming under him." The covenant against incumbrances, when not attached as a supplement to the covenant for quiet enjoyment, as is often and perhaps commonly the case in England, is universally held to be one *in presenti*, so far, at least, as the acts covenanted against are concerned; and how a man's heirs could encumber his estate during his life, is not quite apparent. In the revision of 1835 the words "his heirs and assigns" were omitted, and the language now employed in the statute was adopted, and from that time until the present continued unchanged. It will thus be seen that the covenant for quiet enjoyment contained in all the statutes mentioned, down to 1804, has been omitted in ours, and the words "*and all claiming under him*," which followed that covenant in the Statute of Anne, have been retained, and are now annexed to the covenant against incumbrances. It will be observed also, that these words are used in the Statute of Anne, as a part of the covenants for quiet enjoyment and for further assurances, in connection with the words "heirs and assigns," from which fact it is fairly inferable, that they were intended, as there used, to apply to persons other than the heirs and assigns of the grantor.

It will not be necessary to notice the cases either in England or in this country, in which words of similar import to those used

in our statute, have been construed by themselves, or in connection with the covenant for quiet enjoyment, as in none of them which we have examined were the relations of the parties even remotely analogous to that subsisting between the parties to the transaction now under review, and they consequently shed no light upon our inquiry.

The object of the passage of the Statute of 6 Anne, though it had but a limited territorial application, was doubtless to abridge, or rather to provide means for evading the necessity of employing, the ordinary covenants for title, which, through the ingenuity of the conveyancers, had then attained oppressively expensive proportions. The language usually employed in England to express the covenant against incumbrances, after setting forth that the grantee shall quietly enjoy, was as follows: "and that, (that is the peaceable enjoyment) freely, clearly and absolutely indemnified by the said (vendor) his heirs, executors or administrators, of, from and against all former and other estates, rights, titles, liens, charges and incumbrances whatsoever, made, created, occasioned or suffered by the said (grantor) or any other person or persons whomsoever, *rightfully claiming under or in trust for him*, or by or with his or their acts, deeds, default, privity or procurement." This covenant was oftentimes much more extended even than the foregoing. The words "rightfully claiming under, or in trust for him" are with us represented by the words "all claiming under him;" and though precision may have been in some degree sacrificed to brevity in making the change, there can be no doubt, we think, that the latter phrase was intended to fully express, and to express only, the meaning contained in the former. Argument is unnecessary to establish the proposition that the words "rightfully claiming under or in trust for him" refer only to persons holding in subordination to the right or title of the grantor, and not to those holding adversely to him. The words employed in covenants relating to land must be construed with reference to the particular nature of the covenant. The statutory covenant against incumbrances is based upon the idea that the grantor had not previously sold the land conveyed, but that he was at the time of entering into it the owner thereof, and that it may have

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been incumbered by himself or by some person rightfully claiming under him some estate in the land, consistent with his own title and not hostile thereto, or some estate therein in trust for him. When the grantor undertakes to covenant against the title or acts of those claiming adversely to him, entirely different phraseology is employed. Froman's right to the land, it is true, was derived from Graham, but he did not claim under him within the meaning of this covenant. Being in equity the owner of the land, and entitled to a deed from Graham, he held adversely, and not in subordination, to him. (*Ridgeway vs. Holliday*, 59 Mo. 444.)

The purpose of Graham undoubtedly was, to transfer to Clore the title which he had obligated himself to make to Froman, and to assume only such liability as he would have assumed if he had made the conveyance to Froman. He certainly did not intend to covenant against the acts of Froman. There was no reason why he should. He did not sell the land to Clore. No consideration passed from Clore to Graham for any such undertaking. The only consideration received by Graham for his conveyance and covenants was that paid by Froman. He was simply performing his contract with Froman in making the deed to Froman's vendee. We do not mean to say that the absence of any consideration moving from Clore to Graham could be shown to affect the conveyance, or to deprive Clore of any right to relief on the covenants it contained. We are simply stating the relations of the parties. In cases where the purchase money and interest would be the measure of damages, Graham would be liable on his covenants only to the extent of the purchase money secured from Froman, not for the amount paid to Froman by Clore.

Suppose that Graham had entered into a contract with Froman to execute to him or his assigns a deed with statutory covenants upon the payment of the purchase money, and that upon a proper assignment of Froman's right to a deed to Clore, he had, through proceedings instituted for that purpose, compelled from Graham the execution of a deed to him, would the covenant against incumbrances in that case cover the acts of Froman? * * * It might with as much propriety be said that it would cover the acts

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of Clore himself prior to its execution, or that if the deed had been voluntarily made by Graham, directly to Froman, the covenant would cover the incumbrance put on the land by Froman himself, prior to the date of the deed.

We have not referred to the fact that Clore was chargeable with notice of the mortgage to Daviess County by reason of its being of record, for the reason that if the covenant against incumbrances covered the acts of Froman, even actual knowledge of the existence of the incumbrance on the part of Clore would not relieve Graham from responsibility on that covenant.

The Circuit Court committed no error in holding that plaintiff was not entitled to recover, and its judgment will be affirmed; the other judges concur.

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**W. B. CRUTCHFIELD, Respondent, vs. ST. LOUIS, KANSAS CITY
& NORTHERN RAILWAY Co., Appellant.**

1. *R. R. Corporation act, negligence, question of, cannot be raised under.*—
Under § 43 of the Railroad act (Wagn. Stat. 310-11) no recovery can be had for injuries resulting from the negligent management of the locomotive or train. For that purpose, suit must be brought under § 5 of the damage act.
2. *Damages—Railroad law, § 43; Suit held to be brought under, when.*—
Where plaintiff's petition in suit against a railroad company for injuries to stock, alleges the duty of defendant to erect and maintain fences, the breach of that duty and the prayer for double damages; and direct reference is made in the body of the petition to § 43 of the railroad law, the pleading will be treated as brought under that section, although containing the further averment that the injury was negligently done.
3. *Practice, civil—Instruction—Party cannot object to his own declaration of law.*—
A case will not be reversed for error in giving an instruction for respondent, where the same declaration of law is given at the request of appellant. In such case the party is estopped from objecting, and is not prejudiced by the action complained of.

Appeal from Randolph County Circuit Court.

W. H. Blodgett, for Appellant, cited: *Cary vs. St. Louis, K. C. & N. R'y Co.*, 60 Mo. 209; *Biglow vs. N. Mo. R. R.*

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Co., 48 Mo. 510; Gorman vs. P. R. R. Co., 26 Mo. 441; Wood vs. St. L., K. C. & N. R'y Co., 58 Mo. 109.

T. B. Kimbrough, for Respondent.

The language of the petition, in charging defendant's liability, "negligence, unskillfulness and misconduct" on the part of the defendant's engineers, officers, servants, agents, and employees; and the fact that the court rendered judgment in the case in favor of the plaintiff for exactly the amount found by the jury in their verdict for plaintiff, all show the character of the action, and that it was tried by the court as one, founded not upon the provisions of the 43d section of the statute before referred to, but as founded on the "damage act."

HOUGH, Judge, delivered the opinion of the court.

This was an action brought under the 43d section of the act in relation to railroad companies, to recover double damages for the killing and crippling by defendant's cars of certain horses and mules belonging to plaintiff, at a point on defendant's railroad where it was alleged that defendant had failed to erect and maintain good and substantial fences, as required by the provisions of said section.

The petition contained an allegation that the killing and crippling were negligently done.

The answer contained a specific denial of each allegation in the petition.

The testimony tended to show that the railroad was, at the time and place where the horses and mules were killed and injured, inclosed by a good and substantial fence, as required by law; and that the animals strayed on the track through an open gate at a farm crossing. It did not appear who left the gate open.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

Notwithstanding the allegations that the killing was negligently done, the averments as to the duty of defendant to erect and maintain fences, the alleged breach of that duty, the prayer for double damages, and the direct reference made in the body of the

petition to the 43d section of the railroad law, established beyond controversy, or cavil, that the petition was founded on that section.

The appellant has assigned for error the giving by the court of the following instruction, asked by the plaintiff:

"The jury are instructed that although they may believe that defendant had erected and maintained good and substantial fences on the sides of its road, where the accident occurred, with gates and other cattle guards at farm crossings, yet if they further believe that the killing was the result of negligence on the part of the person in charge of the engine and cars, they must find for plaintiff."

This instruction is in direct conflict with the decision of this court in the case of *Cary vs. St. L., K. C. & N. R'y Co.*, 60 Mo. 209. It was there held that in actions under the 43d section of the railroad law, no recovery can be had for injuries resulting from the negligent management of the train, but for such only as result from the failure of the railroad company to erect and maintain fences, cattle guards, etc.; that for injuries to stock resulting from negligence in the management of a locomotive or train, suit must be brought under the 5th section of the damage act. (See also *Wood vs. R'y Co.*, 58 Mo. 109.)

But notwithstanding this error of the court the judgment must be affirmed, as it appears from the record that in four of the instructions given by the court, at the defendant's own request, the same rule of liability is substantially declared.

We cannot relieve a party from errors committed by himself; and he is estopped from objecting to an instruction given at his own request. (*Chamberlin vs. Smith*, 1 Mo. 482.) When error has been committed against the appellant, to authorize a reversal of the judgment it must appear that such error was or may have been prejudicial to him. If the instruction complained of had been refused by the court, the situation of the defendant would not have been improved. The result must have been the same. The same declaration of law by which the defendant now claims to have been injured, would still have remained to direct the find-

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ing of the jury. A mistake was committed at the trial for which we can afford no relief. The judgment must be affirmed.

All the other judges concur.

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WM. CLARK, *et al.*, Respondents, *vs.* WALKER EVANS, *et al.*,
Appellants.

1. *Practice, civil—Suit on open account—What services insufficient to authorize final judgment at return term—Partnership.*—Where suit is brought in the circuit court upon an open account, nothing under the statute (Wagn. Stat. 1053, § 10) short of a delivery to each defendant of a copy of the petition or of the account, with the items set forth, is sufficient service to authorize final judgment at the return term; and the fact that of two or more defendants, the first is personally served, will not authorize such judgment against a subsequent defendant on proof of service at his place of abode, etc. And it makes no difference that defendants are sued as a firm. (See Phillips *vs.* Evans, ante p. 17.)

Appeal from Pettis County Circuit Court.

E. J. Smith, for Appellants.

To authorize judgment at the return term in such case, it is necessary that each defendant be personally served *by delivering to him a copy of the writ and account*, at least, if not indeed, of petition, writ and account. (Wagn. Stat. 1053, § 10.)

Houston & Bothwell, for Respondents.

One of the firm was served in time with a copy of the account, the other two were duly served with summons, and all made default. They are really one person in the transaction of business, a unit, and in fact but one defendant; and hence the service was sufficient under a proper construction of the statute. (Wagn. Stat. 1053, § 10.)

SHERWOOD, Judge, delivered the opinion of the court.

Action, on open account: the summons returnable to the January term, 1875. The amended return was: "Served the within summons by delivering a copy thereof, together with a

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copy of the annexed petition and account, to H. B. Fletcher, he being first served, and also by leaving a copy for Walker G. Evans, with a white member of his family over the age of fifteen years, at his usual place of abode, all in Pettis county, Missouri, on the 19th December, 1874. Byrd Evans served by leaving a copy of the summons with a white person, a member of the family, at his usual place of abode in Pettis county, Missouri, December 19th, 1874, said member of the family being a white person over the age of fifteen years."

"L. S. MURRAY,

"Sheriff Pettis County, Missouri.

"By S. W. RITCHEY, Deputy."

At the return term judgment by default was entered and made final. The defendants at the next term thereafter, moved to set aside the judgment and quash the execution issued thereon. As the history of this case, aside from certain features in the above return to be presently adverted to, is precisely like that of Philips, Nimicks & Co. against the same defendants, it will be necessary to discuss only such points of difference as distinguish this case from that.

Among the grounds urged in support of the motion were, that no copy of the account was delivered to either of defendants, Walker or Byrd Evans, and that final judgment, instead of an interlocutory one, was taken at the return term against all of the defendants.

The section of the statute (Wagn. Stat. 1053, § 10,) under which service was attempted to be made in this case is as follows: "In any action instituted upon an open account, or an account stated, when the items of the account are set forth in or annexed to the petition, if the defendant has been personally served by the delivery to him of a copy, and makes default, he shall be considered as admitting the account to be due, as set forth or annexed, and final judgment may be rendered against him for the amount thereof, at the time of entering his default."

We cannot entertain a particle of doubt as to what this section means. Nothing short of the delivery to each defendant of a

petition, or of an account wherein the items of such account are set forth, will answer the statutory requirement. And it makes no sort of difference that the defendants were sued as a firm. No one can be *considered as "admitting the account to be due,"* unless "*personally served.*"

It follows that as the statute was not obeyed, the judgment was irregular, should have been for that irregularity set aside (Branstetter vs. Rives, 34 Mo. 318; Dougherty vs. St. Vincent College, 58 Mo. 579; Huff vs. Shepherd, 58 Mo. 242,) and must be reversed and the cause remanded. Judge Napton absent; the other judges concur.

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STATE OF MISSOURI, Respondent, vs. W. H. BARNARD, Appellant.

1. *Criminal law—Keeping of bawdy house—Entry by city register of Sedalia—Proceeding under statute against same defendant for same offense—Evidence, how far character of house shown by that of inmates.*—In a criminal proceeding in Pettis County under the statute (Wagn. Stat., 502, § 19), an entry in the records of the city register of the city of Sedalia, that defendant had been found guilty of keeping a bawdy house, where the record further showed that defendant had pleaded "not guilty," and had appealed from the judgment, and there was no evidence in the State trial that the appeal had not been determined, was held inadmissible against the accused, and its introduction on error not cured by an instruction that if an appeal were still pending the facts shown by the record would not authorize a conviction; and the error will authorize a reversal of the cause. Contrawise, where co-defendants of the accused were shown by the entry to have been arrested by the recorder as inmates of the same house, and to have been convicted, and to have failed to appeal from his judgment, the entry would be admissible for the purpose of showing the character of the house kept by defendant.

Appeal from Pettis County Circuit Court.

Snoddy & Bridges, for Appellant.

J. S. Smith, Atty Gen'l, for Respondent,

NORTON, Judge, delivered the opinion of the court.

At the January term, 1873, of the Pettis county circuit court the defendant and one Lizzie Cook were indicted, charged with keeping a bawdy house in violation of section 19. (Wagn. Stat. p. 502.)

At a term of said court held in September, 1873, defendants were arraigned for trial, and a separate trial awarded to defendant Barnard on his motion.

The jury returned a verdict of guilty and assessed the punishment at a fine of five hundred dollars, which by the court was reduced to three hundred dollars and judgment entered accordingly.

A motion for new trial and in arrest of judgment were overruled and the case is brought here for review on appeal.

The errors assigned are to the admissions of evidence and the giving and refusing instructions.

The State introduced as a witness one Geet who testified that he was city register and deputy recorder, and had the custody of the city records, and had the records for the city for 1872 in court; that under date of July 1st, 1872, he found an entry against Lizzie Cook for keeping a bawdy house and against Kate Gibson, Alice Woods and others for being inmates of the same, and that the plea entered by them was "guilty;" that under date October 23d, 1872, there was an entry against Lizzie Cook and William Barnard for keeping a bawdy house to which a plea of "not guilty" was entered. The case was continued several times, was tried by a jury and both defendants found guilty—from which defendant Barnard appealed.

To the introduction of the above evidence defendant objected, which objection the court overruled and admitted the evidence.

This we think was manifest error as to that portion of the evidence relating to the entries concerning the charge against defendant and Lizzie Cook, to which a plea of "not guilty" was entered, and on which there was a trial and verdict of "guilty" by a jury. If a plea of "guilty" instead of "not guilty" had been entered, then the entry might have gone to the jury as an admission on the part of defendant that at the time of the charge, October, 1872, he did keep a bawdy house. But when the defendant stood in the recorder's court denying the charge, we are at a loss to perceive on

what principle the verdict of "guilty" could be permitted to go to the jury, especially when the judgment was appealed from.

The evidence was well calculated to impress the minds of the jury greatly to defendant's prejudice, and the error committed in receiving it was not cured by the subsequent action of the court in giving an instruction, on defendant's motion, that if defendant pleaded "not guilty," and was on trial found guilty and took an appeal which was still pending, they could not from those facts find defendant "guilty." There was no evidence that the appeal was still pending, and the instruction did not withdraw from the jury the improper evidence admitted, but incorporated for their consideration a question not in evidence. The objections to so much of the evidence of the city recorder as related to the plea of Lizzie Cook and the inmates of the house were not well taken, and that evidence might have been received for the purpose of establishing the character or kind of house the defendant was keeping.

In prosecutions like this it is necessary to show that the house kept was a bawdy house, as one of the elements constituting the crime, and the facts that the inmates of it were confessedly prostitutes strongly conduces to establish it.

It is unnecessary to review the other objections taken to the evidence or instructions except to say that the case was well tried, except in the particular above mentioned; and for the error thus committed the judgment will be reversed and cause remanded; all the other judges concur.

—o—

STATE OF MISSOURI, Respondent, *vs.* ALFRED G. DUNCAN, Appellant.

1. *Jury—Confession—Evidence.*—It is error to leave the question whether a confession is voluntary or not to the jury, more especially when the case is one creating public excitement and where there is a strong feeling in the community against the accused.
2. *Conspiracy—Declarations of confederates when competent as against each other.*—Declarations of confederates against each other are only admissible as part of the *res gestæ*, and unless they accompany acts done in the prosecution of

the common object, they are inadmissible. When that object is an end, whether by accomplishment or abandonment, no one of the confederates is permitted by any subsequent act or declaration of his own to affect the others.

3. *Combination for unlawful purpose—Responsibility of member for past acts—Relation.*—One who joins a band of persons combined for an unlawful purpose does not thereby become responsible criminally for acts done by other members of the combination prior to his becoming a member.
4. *Instructions, misleading, refusal of.*—Instructions calculated to mislead should be refused.

Appeal from Webster County Circuit Court.

Mussey, McAffee & Mitchell, for Appellant.

I. The court erred in receiving in evidence the statements of Brown and Flynn, not made in the presence of defendant, and made some time after the crime was committed. Those statements were a narrative of past events and not made in the furtherance of any criminal enterprise. They were not a part of the *res gestæ*. (State vs. Ross, 29 Mo. 32, see p. 50, 1 Greenl. Ev., §§ 233, 111; Ladd vs. Couzins, 35 Mo. 513-516; 1 Phil. Ev. [4 Am. Ed. E. & C.], 208; State vs. Thibreau, 30 Vt. 100; 1st. Am. Co. Law, [6 ed.] 702; 2 Russ. Crimes, 697; United States vs. Babcock, 3 Dill. C. C., pp. 615, 616.)

II. The admissions or confessions of the defendant were not voluntarily made, but were made whilst defendant was in duress and by means of intimidation and threats, and ought to have been excluded from the jury. (1 Am. Co. Law, § 685; 1 Greenl. Ev., §§ 219, 230; 1 Phil. Ev. [4 Am. ed. E. & C.] 544-557; State vs. Brockman, 46 Mo. 566; Hector vs. State, 2 Mo. 166; 2 Russ. Crimes, 826; State vs. Jones, 54 Mo. 476.)

III. The referring to the jury whether they should consider or exclude the testimony of the declarations of the defendant is error. (1 Greenl. Ev. 230; Hector vs. State, 2 Mo. 166; 1 Phil. Ev. [4 Am. ed. E. & C.] 543.)

The case of Brown vs. Commonwealth, [76 Penn. 378] is in conflict with the common law and the adjudications of this State, and dissimilar to the case at bar. (See Hector vs. State, 2 Mo. 166.)

J. L. Smith, Att'y Gen'l, for Respondent, cited in argument: 2 Bish C., 229; State vs. Daubert, 42 Mo. 241; 29 Mo. 50; Clawson vs. State, 14 Ohio St. 239; Wagn. Stat. 456, 457, §§ 25, 26; see also Id. 513, § 10; 3 Greenl. 241; 29 Mo. 32; 1 Whart. Crim. Law 702-706; 1 Bald. U. S. C. C. 293.

HENRY, Judge, delivered the opinion of the court.

At the March term, 1870, of the Polk Circuit Court, defendant and others were jointly indicted for grand larceny, and charged with having stolen a mare, the property of Frederick Gesley. Subsequently, on defendant's application, a change of venue was awarded to Webster county, and on a separate trial of the cause in that court, at the September term, 1873, the jury returned a verdict of guilty against the defendant, and assessed his punishment at two years' imprisonment in the penitentiary.

In due time he filed his motion for a new trial, which the court overruled, and thereupon judgment was entered in accordance with the verdict; from which defendant has appealed to this court.

The principal evidence against the defendant was that of his own confessions, and the statement of Brown and Flynn, two persons accused of being members of a gang of horse thieves, of which, it was alleged, defendant was also a member. In their statements they admitted their own guilt and implicated defendant. Their statements were made after the mare in question, and a mule stolen from the same neighborhood, were found in their possession at Jefferson City, and after they were arrested.

There was conflicting evidence as to the circumstances under which the defendant's confessions were made.

J. B. Shaw testified that he was placed as guard over defendant, by one Captain Lunford, who, it seems, was captain of a vigilance company; that next morning, in company with one Ashworth, he started with defendant for a place called Halfway; that when they had gone about half the distance to Halfway, witness dismounted from his horse, defendant being on foot, and read to defendant the charges against him, from a paper which had been placed in his hands by Captain Lunford.

The charge was, that defendant was guilty of or suspected of stealing Gesley's mare and the Brannin mule; that Brown and Flynn had confessed, and if defendant did not he was to be taken to the woods and shot. Other witnesses testify to confessions of guilt made by defendant on the same day after he reached Halfway, and that they were voluntary.

Ashworth testified that he was present when Shaw read the paper to defendant, but did not hear him read from the paper "that if defendant did not confess he was to be taken to the woods and shot."

√ The court left it to the jury to determine whether the confessions were voluntary or not, and in this the court committed an error. (2 Mo. 166; 1 Greenl. Ev. 219, 230; 1 Phil. Ev. 543.) It was peculiarly the duty of the court, in this case, to determine whether the defendant's confessions were voluntary or not. The case created considerable excitement, and large numbers of men in two counties were organized into companies to arrest horse thieves. The evidence disclosed that there was a strong feeling in those counties against the accused, and those charged with being his confederates; that in one of the counties some persons had been hung for horse stealing, and under those circumstances it was a palpable error to submit to the jury the question of the admissibility of the defendant's confessions. There was not only a question as to whether any threats were made, but whether statements afterwards made by the prisoner, were made under the influence of such threats.

If the court had passed upon the question, and admitted the evidence, we should hesitate to disturb the verdict on that account; but it is by no means clear that, if the court had done its duty in that respect, it would have permitted the State to prove the defendant's confessions. The only evidence to show that defendants and Brown and Flynn were confederates, was defendant's own statements, and, as in the view we take of the case, those statements were improperly admitted, there was no sufficient proof of the confederacy to admit proof of any statements made by Brown and Flynn.

But aside from this consideration, the evidence of what Brown and Flynn stated should have been excluded. If the proof had been ample that defendant and Brown and Flynn belonged to a gang of horse thieves, yet a statement or confession made by them, after the common object had been accomplished, would not be admissible against the defendant.

Declarations of confederates against each other are only admissible as part of the *res gestæ*, and unless they accompany acts done in the prosecution of the common object, they are inadmissible.

"When, however, the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted, by any subsequent act or declaration of his own to affect the others." (Am. Co. Law, 703; 30 Vt. 100; 20 Mo. 50; 1 Greenl. Ev., § 233; 1 Phil. Ev. 168.)

The second instruction given for the State is erroneous in telling the jury that if there was a party of persons combined for the purpose of stealing horses, etc., and sharing the proceeds, and defendant at any time, at or after the formation of said company, became a member, he was criminally liable for all the acts done by any other person belonging to the combination, before and afterwards, in furtherance of the common design. In other words, if the defendant joined a company of horse thieves, he was liable for all the thefts they or any of them may have committed before he became a member, whether he received any part of the property so stolen, or its proceeds or not; his joining the company had relation back, and implicated him in every theft they had committed, even years before. The statement of the proposition is its own refutation.

The fourth instruction for the State should be modified to express more clearly its meaning. In its present form it may be construed to mean the same as the second. We do not understand it to assert the same doctrine, but it does not, as clearly as it should, exclude such a construction, and is calculated to mislead.

With the concurrence of the other judges, the judgment is reversed and the cause remanded.

 Maher v. Atl. & Pac. R. R.

MARGARET MAHER, Respondent, vs. ATLANTIC & PACIFIC RAILROAD, Appellant.

1. *Railroads—Damages—Contributory negligence—Evidence—Non-suit.*—In suit against a railroad under § 2 of the damage act (Wagn. Stat. 519-20) it appeared that the employee was run over by an express train passing at the usual hour—about seven in the evening; that the night was moonlight, but at the site of the accident, owing to a cut and curve in the road, deceased could not have been seen on the track more than two hundred and fifty yards; and there was no proof that the engineer saw him at all, or that he might with proper care have seen him; and on the other hand it was shown that deceased, for fourteen years, had lived in a house standing on the company's right of way, and presumably knew of the time of the passage of the train, and might have seen it coming in time to get off the track. *Held*, that plaintiff made out no case for a jury, and should have been non-suited.

It is the duty of the court, when there is no evidence of negligence on the part of the company, or there is uncontradicted evidence of negligence on the part of the persons killed or injured contributing directly to the result, so to instruct the jury.

2. *Negligence—Rate of railroad speed.*—No rate of speed in a railroad train is negligence *per se*, except where the law of the State, or of a municipal corporation authorized to do so, prescribes a limit.

3. *Damages—Railroad—Care of company after discovering danger—What requisite.*—To make a railroad company liable where the party injured has also been negligent, it should appear that the proximate cause of the injury was defendant's omission, after becoming aware of plaintiff's danger, to use a proper degree of care to avoid injuring him. If, on discovering him upon the track, it was impossible, with safety to the train and those on board, to stop the train in time to prevent the casualty, the company cannot be held, unless guilty of negligence beforehand which creates the impossibility.

Appeal from St. Louis Circuit Court.

J. N. Litton, for Appellant, cited: *Shearm. & Redf. Negl.*, § 478; *Phila. & Reading R. R. vs. Hummel*, 44 Penn. St. 375; *Railroad vs. Skinner*, 19 Penn. St. 298; *Railroad Co. vs. Norton*, 24 Penn. St. 469; *Telfer vs. Northern R. R. Co.*, 1 Vroom [N. J.], 192; *Withers vs. North Kent R. R. Co.*, 27 Law J. Exch. 417; *Sharrod vs. London & N. W. R. R.*, 4 Exch. 580; *Isabel vs. Han. & St. Joe. R. R. Co.*, 2 Cent. Law. J. 590; *Shearm. & Redf. Negl.* §§ 25, 36; *Karle vs. K. C.*, *St. Joe. & C. B. R. R. Co.*, 55 Mo. 484; *Finlayson vs. C. B. & Q. R. R. Co.*, 1 Dill. C. C. 579; *Railroad Co. vs. Skinner*, 19 Penn. St. 298; *Fort W. & C. R. R. vs. Evans*, 53 Penn. St. 250; *Fley-*

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tas vs. Pontchartrain R. R. Co., 18 La. 339 ; Jeffersonville, Madison, &c. R. R. vs. Goldsmith, 47 Ind. 43 ; Evansville R. R. vs. Hiatt, 17 Ind. 102 ; Maynard vs. Boston & M. R. R. Co., 115 Mass. 458 ; Munger vs. Tonawanda R. R. Co., 4 Comst. [N. Y.] 357 ; Artz vs. C., R. I. & P. R. R. Co., 34 Ia. 153 ; Vandegrift vs. Rediker, 2 Zab. 185 ; Cin. D. & H. R. R. vs. Waterson, Ohio St. 424 ; Tower vs. Worc. R. R. Co., 2 R. I. 404 ; Louisville R. R. vs. Ballard, 2 Metc. (Ky.) 177 ; Gillis vs. Penn. R. R. Co., 59 Penn. St. 122 ; Ilott vs. Wilkes, 3 B. & Ald. 304 ; Hounsell vs. Smith, 7 C. B. [N. S.] 731 ; Binks vs. South Yorkshire R. R., 3 Best & S. 244 ; Phila. & R. R. R. Co. vs. Spearen, 47 Penn. St. 300 ; Wilds vs. Hudson R. R. Co., 24 N. Y. 433 ; Catawissa R. R. Co. vs. Armstrong, 49 Penn. St. 193 ; Conlin vs. Charleston, 15 Rich. [S. C.] 209 ; Delafield vs. Union Ferry Co., 10 Bosw. [N. Y.] 218 ; New Jersey Express Co. vs. Nichols, 33 N. J. L. [4 Vroom.] 430 ; Cunningham vs. Gyness, 22 Wis. 248.

J. S. Laurie, for Respondent, cited : 40 Mo. 156 ; 37 Mo. 552 ; 43 Mo. 383 ; 50 Mo. 563 ; 3 Mees. & W. 247 ; 10 Mees. & W. 545 ; 1 Ad. & Ell. [N. S.] 28.

HENRY, Judge, delivered the opinion of the court.

The plaintiff is the widow of John Maher, who was killed on the Pacific railroad by a train of cars going west on the night of the 5th of October, 1870. She sued the company in the circuit court of Franklin county, under the second section of the damage act, in February, 1871.

The petition is in the usual form, and the answer a general denial, except that it admits defendant's corporate character ; that John Maher was plaintiff's husband ; and specially avers that Maher "was a trespasser on the road, and was guilty of negligence directly causing and contributing to his death."

There was a change of venue to St. Louis county, and at a special term of the circuit court of St. Louis county, in February, 1874, there was a trial of the cause resulting in a verdict for plaintiff for \$5,000.

In proper time defendant filed its motion for a new trial, which was overruled, and judgment was then rendered on the verdict. From this judgment there was an appeal to the General Term, where the judgment was affirmed, and from that judgment it has appealed to this court.

It appears from the evidence, that on the morning of the day of the disaster John Maher left home for his work of cutting brush on the section of the road on which he was employed as a section man; that he was unwell, and that when he got to his place of work he was somewhat intoxicated, and went to the house of the section foreman, where he remained about three hours, when he went to Gray's Summit. About seven o'clock that evening he was seen by two or three witnesses on a bridge over the railroad cut. By another witness he was seen after that, going up the track towards his home. This was about a half hour before the express train passed, by which, the evidence tends to show, he was killed.

There was evidence tending to show that as late as six o'clock that afternoon deceased was intoxicated. Singleton, who testifies to having seen him on the bridge about six o'clock, says he was drunk, singing and talking. May, who met him afterwards going up the track towards his home, says he thought he was drunk. It was after seven o'clock when he was found dead on the track.

It seems from the testimony that deceased was killed at, or very near, a culvert, and fragments of his body were found scattered along the road west of the culvert for one hundred and fifty yards. East of the culvert, about two hundred and fifty yards, is a cut thirty or forty feet deep, and one hundred and fifty or one hundred and sixty yards long, and while in this cut one on a train could not see an object on the track at the culvert.

The only person who testifies to having seen deceased after May met him was his son, Frank Maher, who with his brother John was sent by their mother to see about their father; he testifies that as soon as he got upon the straight track he saw the express train just coming out of the cut, and he stooped down and thought he saw an object on the track which he took to be

his father, and when he reached the place where he thought he saw the object, he discovered what remained of his father. He and John both fix the distance at which Frank says he discovered the object which he took for his father, at four hundred or five hundred yards. It appears to have been a bright moonlight night. John did not see the object seen by his brother. Frank testified that the train was running as fast as he ever saw it run. John does not testify as to the speed of the train. The engineer thinks they were running less than twenty miles an hour; thinks he could have seen Maher if he had been on the track, either sitting, lying down, or standing up.

The defendant asked the following instructions, which were all refused:

1. "The court instructs the jury that, under the evidence given in this cause, they will find for defendant."

2. "The court instructs the jury that there is no evidence that the train was being run at an improper rate of speed, and they will conclusively presume that the rate of speed at the time of the accident was a lawful rate of speed."

3. "The court instructs the jury that under the evidence the defendant was not required to ring the bell or sound a whistle at the place where the accident happened, or at all, unless the men in charge of the locomotive knew that Maher was on the track."

4. "If the jury believe that the engineer did not see Maher, then the court instructs the jury that they must find a verdict for the defendant, unless they believe the engineer was guilty of greater carelessness in not seeing Maher than Maher was in being on the track."

5. "The court instructs the jury that if they believe that Maher was on the track of defendant when he was killed, and that he was guilty of negligence which directly contributed to his death in being on said track at that time, and if they further believe that the men in charge of the locomotive did not see Maher at all, or know that he was there, or in danger, then the jury will find a verdict for the defendant."

6. "The court instructs the jury that in considering whether the defendant was guilty of negligence in the premises, they will confine their attention to the conduct of the engineer of the train in question."

7. "The court instructs the jury that John Maher had no right to be on the track of defendant at the time and place where the evidence shows that he was killed, and that he should not have been there."

8. "If the jury believe that John Maher was at the time of the accident intoxicated, and that if he had been sober he would not have been killed, then they will find for defendant."

9. "The jury are instructed that the law presumes that the men in charge of the train used every precaution that careful and prudent men would have used under the same circumstances, and that the presumption is conclusive, unless the jury believe the weight of evidence adduced before them shows that they did not, and unless the jury believe the evidence shows they did not, then they will find for the defendant."

10. "The court instructs the jury that if John Maher was guilty of any negligence that directly contributed to his death in any degree, they will find a verdict for defendant."

11. "The court instructs the jury that, under the evidence in this case, John Maher was guilty of negligence in being on the track at the time of the accident."

12. "The mere fact that John Maher was killed by the train in question is not sufficient to authorize the jury to find a verdict for the plaintiff in this case, but they must find a verdict for the defendant unless they believe from the evidence two other facts, namely: 1st, that the men in charge of the train in question failed to use some precaution that careful railroad men would have used under the same circumstances, and that if said precaution had been used John Maher would not have been killed; and 2d, that John Maher himself used every precaution that a careful, prudent man would have used to avoid the danger which resulted in his death. And if they believe either that the engineer used every precaution that a careful engineer would have used under the same circumstances, or that Maher failed to use every

precaution that a careful man would to avoid the danger, and thereby contributed directly to his death, then in either case, they will find a verdict for the defendant."

13. "If the jury believe that John Maher did not use every precaution to avoid danger that a careful, prudent and sober man would have used, and by such failure directly contributed to his death, then they will find a verdict for the defendant. And if the fact be that John Maher was drunk, that fact does not relieve him from using the care and caution that a sober man would have used under the same circumstances."

14. "The court instructs the jury that if when John Maher started to go home it was a short time before the express train was due, and he knew, or ought to have known, that fact, and he then walked homeward on the track, it was his duty to keep a constant lookout for said express train, and to use every precaution to avoid danger, and he had no right to rely exclusively upon being notified by the men in charge of the train of his danger. And if the jury believe he failed to keep such a lookout, and failed to use every precaution to avoid danger that a careful, prudent man would have used, and that if he had used such precaution the accident would not have happened, then the jury are instructed that he was guilty of contributory negligence."

To the action of the court in refusing each of these instructions, the defendant then and there excepted.

The court, at the instance of plaintiff, gave the following instructions:

1. "The court instructs the jury that even though John Maher may have been culpable and a trespasser, without right or excuse to be on the track of the railroad, yet if defendant's agents, or servants, by the use of ordinary care and prudence, might have avoided inflicting the injuries which occasioned his death, then plaintiff is entitled to recover.

"As to what constitutes negligence or prudence is for the jury to determine from the evidence, and the burden of proof to show that Maher's death was occasioned by his own fault or carelessness is on the defendant."

2. "Railroad companies, owing to the dangerous character of the business they engage in, are held to great care in the management and operation of their machinery and vehicles, and if the jury believe from the evidence that the defendant's agents or servants, in managing the locomotive or other machinery and the train of cars, failed to use reasonable care and caution by which the injuries might have been avoided, they will find for plaintiff."

3. "The jury are instructed that although the railroad company is the absolute owner of its track, and has the right to its free and unmolested use, still it is not absolved from the exercise of proper care and diligence to prevent injuries to others when they happen on the track. There is no absolute rule as to negligence to cover all cases, but even though the deceased was at the time of his death a trespasser on defendant's track, yet if the jury believe from the evidence that defendant's agents in charge of the running train, saw, or could have seen, deceased while on the track, and might, by the use of reasonable care and prudence, have avoided running over him, then the jury are instructed to find for the plaintiff. If the verdict is for the plaintiff, the jury are instructed to find for her in the sum of five thousand dollars."

Defendant objected to each of these, and to the action of the court in giving each of said last named instructions the defendant then and there excepted. And the court on its own motion gave the following instructions :

1. "The mere fact that John Maher was killed by the train in question is not sufficient to authorize the jury to find a verdict for the plaintiff in this case, but they must find a verdict for the defendant, unless they believe from the evidence two other facts, namely: 1st, that the men in charge of the train in question failed to use such precautions as careful railroad men would have used under the same circumstances, and that if said precaution had been used John Maher would not have been killed; and, 2d, that John Maher himself used every precaution that a careful, prudent man would have used to avoid the danger which resulted in his death; and, if they believe either that the men in

charge of defendant's train at the time used every precaution that careful men would have used under the same circumstances, or, that Maher failed to use every precaution that a careful man would to avoid the danger, and thereby contributed directly to his death, then, in either case, they will find a verdict for defendant."

2. "If the jury believe that John Maher did not use every precaution to avoid danger that a careful, prudent man would have used, and by such failure directly contributed to his death, then they will find a verdict for the defendant. And if the fact be that John Maher was drunk, that fact does not relieve him from using the care and caution that a sober man would have used under the same circumstances."

3. "The court instructs the jury that if, when John Maher started to go home, it was a short time before the express train was due, and that he knew that fact, and that he then walked homeward on the track, it was his duty to keep a constant lookout for said express train, and to use every precaution to avoid danger, and he had no right to rely exclusively upon being notified by the men in charge of the train of his danger. And if the jury believe he failed to keep such a lookout, and failed to use every precaution to avoid danger that a careful, prudent man would have used, and that, if he had used such precaution, the accident would not have happened, then the jury are instructed that he was guilty of contributory negligence."

To which the defendant at the time objected, and to the action of the court in giving the same the defendant then and there accepted.

The first instruction asked by defendant should have been given. We have examined the record carefully to find evidence of negligence on the part of the employees of defendant, who were running the train, but have failed to discover any.

The accident occurred at night. The deceased was killed at a point but two hundred and forty-seven yards from the place on the road from which he could first be seen by the engineer and fireman under most favorable circumstances. It may be said that they might have seen him, but there is no evidence that they

did, and no evidence that their failure to see him was the result of negligence on their part. On the other hand, the evidence that deceased, by his own negligence, contributed directly to the result, was abundant. He lived, and for fourteen years had lived, in a house standing on the company's right of way. It is not going too far to presume that he knew when regular trains passed by his residence, and yet, about the time this train was due, he went upon the track and remained upon it until struck and mangled by the train. It was an easier matter for him to see the train approaching than for those running the train to see him. His sons, four hundred yards west of him, saw the train as it came out of the cut, a distance of six hundred and forty-seven yards, and he certainly could have seen it when it was within two hundred and forty-seven yards of him, if not asleep on the track, or too drunk to be conscious of the danger he was in. To hold railroad companies liable under such circumstances, is to make them insurers of the lives of all persons who go upon their tracks. It is the duty of the court, when there is no evidence of negligence on the part of the company, or there is uncontradicted evidence of negligence on the part of persons killed or injured, contributing directly to the result, so to instruct the jury. If there had been a case for the jury, the instructions given by the court fairly presented the law of the case to the jury, and defendant would have had no reason to complain except for the refusal of his second instruction, which should then have been given.

It may be urged that there was evidence that the train was running at too great a speed. The only evidence on that subject was that of Frank Maher and the engineer. Maher said it was running as fast as he ever saw it run, and the engineer says it was running less than twenty miles an hour. It may have been going as fast as Maher ever saw it run, but how fast was that? He does not say, and we are not to presume that he ever saw it run at a rate of speed greater than its usual and ordinary rate. No conceivable rate of speed is *per se* negligence, except where the law of the State or a municipal corporation, authorized to do so, prescribes a limit. (Shearm. & Redf. Negl. § 478.)

In 1 Vroom [N. J.] 192, the learned judge who delivered the opinion of the court said: "I know of no limit to the speed they are entitled to make, except that fixed by a careful regard to the safety of the trains and the passengers conveyed by them."

We are not prepared to go to that extent, but think that there must not only be a careful regard for passengers and trains, but also a proper regard for human life, in running through towns and populous neighborhoods, and at places on the road where, by the forbearance and tacit consent of the company, persons are in the habit of passing over or along the road, even where there are no public crossings. The rule is that the company shall fix its own rate of speed as regards others than passengers, and the above are exceptional cases, each standing upon legislative enactment, or its own peculiar circumstances.

As the judgment will be reversed and the cause remanded, it is proper to notice two other errors committed by the court. The first instruction given at plaintiff's instance should be modified to meet the cases of *Karle vs. K. C., St. Jo. & C. B. R. R. Co.* (55 Mo. 484), and *Isabel vs. Han. & St. Jo. R. R. Co.* (60 Mo. 482.) They announce the true doctrine, which is, that to make the defendant liable where plaintiff has also been negligent, it should appear that the proximate cause of the injury was defendant's omission, after becoming aware of plaintiff's danger, to use a proper degree of care to avoid injuring him.

The engineer, witness for defendant, was asked by defendant's attorney in what distance he could check up a train, such as he had that night, coming down the hill. Plaintiff objected and the court sustained the objection, and refused to permit witness to answer the question. Whether the engineer could have checked up the train in the distance between the mouth of the cut and the culvert, was an important inquiry, and relevant to the issue, and the occupation of witness on the train enabled him to form a correct opinion on that subject, and he should have been permitted to answer the question.

If the deceased had been discovered on the track as soon as the locomotive came out of the cut, and the evidence was that he could not sooner have been seen by the engineer or fireman, and

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it was then impossible, with safety to the train and those aboard, to stop the train in time to save the life of deceased, there is no principle of law upon which the company could be held liable, unless guilty of negligence before, which created the impossibility.

With the concurrence of the other judges, the judgment is reversed and the cause remanded.

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WM. C. RICKEY, *et al.*, Respondents, PHIL. ZEPPENFELDT,
et al., Appellants.

1. *Instructions—Refusal of, no error, when.*—The refusal of instructions substantially incorporated in others which are given is not error.
2. *Instructions—Evidence, conflict of—Jury.*—Questions of conflicting testimony are properly left to the jury under appropriate instructions.
3. *Contract—Part fulfilment—Measure of damages.*—Where by the terms of the contract for the sale of certain saw logs; they were to be "received and paid for when as much as 50,000 feet were ready," if they received less than that number they would be liable on the *quantum meruit* for what they got, taking the contract price as their value, if the agreement had been carried out and making proper allowance for the difference between that and the value of the logs as furnished.
4. *Sale—Title passes without transfer of possession, when.*—A sale without delivery or possession taken by the vendee passes the title, if the property is of such a nature and so situated that his possession would be impracticable or inconvenient. So where the article though bought in general terms from a large number of the same description, is afterwards selected and set apart with the assent of the parties as the thing purchased.

Appeal from Cole County Circuit Court.

E. L. King & Bro. for Appellants, cited: *The State v. Bank of Mo.*, 45 Mo. 528; *Norton vs. Ball*, 48 Mo. 113; *Pattison vs. Judd*, 27 Mo. 563; *Marsh vs. Richards*, 29 Mo. 99.

Ewing, Smith & Pope, for Respondents, cited: *Bass vs. Walsh*, 39 Mo. 192; *Blow vs. Spear*, 43 Mo. 496; *Means vs. Williamson*, 37 Me. 556; *Hil. Sales* (2nd Ed.) 88, 91.

HENRY, Judge, delivered the opinion of the court.

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This was an action commenced in the Cole circuit court by defendants in error, Rickey and Sinclair, against plaintiffs in error, Zeppenfeldt and Fischer on a written agreement between the parties, fully set out in the petition, by which Zeppenfeldt and Fischer agreed to pay plaintiffs for saw logs, cotton wood, elm and sycamore to be received and measured on the bank of the Missouri river, and at the farm of plaintiffs, in Boon county, Missouri, at six dollars per thousand feet, board measure, etc. ; "said logs to be measured, received and paid for when there is as much as fifty thousand feet ready on said river bank ; all logs furnished under said contract, not to exceed two hundred thousand feet, board measure, and the time of delivery not to be later than Sept. 18, 1872."

Plaintiffs allege in their petition, that under this contract, they delivered to defendants logs at various times for which defendants paid them, but that on July 29th, 1872, they delivered under this contract, and defendant received, eighty-one saw logs, of the kind specified in the contract, containing 31,649 feet for which defendants refuse to pay them.

In their answer defendants admit the execution of the contract, but deny all the other allegations in the petition.

At the November term of said court, 1874, there was a trial of said cause, which resulted in a verdict for plaintiff for \$167.85.

In due time defendants filed their motion for a new trial, which was by the court overruled, and afterwards their motion in arrest of judgment, which was also overruled, and judgment was rendered against them in accordance with the verdict, from which they have appealed to this court.

From the bill of exceptions it appears that there was evidence on the part of the plaintiffs, tending to show that they had delivered the logs to one Hudson for defendant, and that Hudson was the agent of defendants' to measure and receive them. There was also evidence on the part of defendant conducing to show that Hudson was not their agent to receive the logs, and that he did not receive them, and conclusively establishing the fact that defendants did not, in person, receive them at the place where they were to be delivered.

At plaintiffs' instance the court instructed the jury as follows :

1st. " If the jury believe from the evidence that the plaintiffs sold and delivered to defendants, under said contract, the logs mentioned in plaintiffs' petition, or any part thereof, they will find for plaintiffs the amount thereof, at the price fixed in said contract."

2nd. " The court instructs the jury, that the removal of all, or any part of said logs, by defendants, was not necessary to complete the delivery thereof by plaintiffs to the defendants."

The defendants asked the court to instruct the jury as follows :

1st. " The jury are instructed that it devolves upon plaintiffs to show that defendants, or one of them, or their authorized agent, did actually receive the logs mentioned in the petition, and in the absence of such showing the jury must find for defendants ; and the jury are further instructed that the delivery of the logs to Hudson, and any acceptance by him, was not binding on defendants, unless the jury further believe from the evidence that Hudson was authorized by defendants, or one of them, to receive the logs for them, or afterwards ratified his acts in receiving them."

2nd. " Although the jury may believe that defendants, through Hudson, got a part of the logs mentioned in the petition, yet if they believe that Hudson took such logs out of the lot, for the purpose of filling out a raft of other logs for defendants, and that he did so without the direction or authority of defendants, then defendants are not liable to plaintiffs under the contract sued on, although they afterwards received the same through Hudson, and the jury will so find."

3rd. " The plaintiffs cannot recover in this action against defendants for any logs which they may believe that Hudson took and delivered to defendants, unless the jury believe that such logs so taken by Hudson, were taken by the authority or direction of defendants, and that they were taken and delivered in pursuance and under the terms of the written contract sued on."

4th. " Under the pleadings and the evidence plaintiffs cannot recover, and the jury will find for defendants."

5th. "Before the plaintiffs can recover in this form of action, they must show affirmatively that they delivered the logs, of the kind and quality, and to the amount in feet and at the place mentioned in the contract sued on, and that defendant received the same."

The court gave the first and refused the other instructions asked for by defendants, and the only question presented by the record for this court to determine, is, whether the instructions properly and fairly presented to the jury the law of the case.

The first instruction for plaintiffs predicates their right to recover, upon the sale and delivery of the logs to the defendants, under the contract, and the instruction given by the court at the request of defendants, required the jury before they could render a verdict for plaintiffs, to find from the evidence, that the defendants, or one of them, or their duly authorized agent, did actually receive the logs, in question, and that the delivery of the logs to Hudson was not binding on defendants, unless he was authorized by defendants, or one of them, to receive the logs, or they afterwards ratified his acts in receiving them. Neither the second nor the third instruction, refused by the court, asserts any proposition of law that is not substantially embraced in the instructions given.

Plaintiff in error contend, that there was no evidence that Hudson was their agent to receive the logs, and therefore no evidence that the logs were delivered to them, and that consequently their fourth instruction should have been given. The testimony of Rickey, one of the plaintiffs, was as follows, on that point: "I delivered them to Hudson, who said he was the agent of defendants. Zeppenfeldt told me he would send Hudson up to measure the logs. I delivered to Zeppenfeldt a large number of other logs on this contract, which he paid me for. I never delivered any of the logs to either of defendants in person, I delivered them to Hudson."

Zeppenfeldt, for defendants, testified that Hudson was not his agent to receive, but only to measure the logs.

Hudson, for defendants, testified as follows: "I went up and measured the logs and received them. I reported the number and

amount to Zeppenfeldt. Told him some of them were banked too far from the river. He did not authorize me to receive them." He also testified that he was then rafting logs for defendants.

We think that the court committed no error in refusing the fourth instruction. There was evidence tending to prove that Hudson was agent of the defendants. There was conflicting evidence on that issue, and the court very properly left it to the jury to determine on which side was the preponderance.

The fifth instruction, the refusal of which by the court is complained of by the defendant, asserts as a proposition of law, that unless plaintiffs delivered the logs, of the kind and quality, and to the amount in feet, and at the place mentioned in the contract, they had no right to recover. In other words, that although defendants may have actually received and used any quantity of logs less than 50,000 feet, they are not bound to pay for them.

The terms of the contract are that the logs are "to be measured and received and paid for, when there is as much as 50,000 feet ready, etc." Defendant could not under that contract have been required to receive less than 50,000 feet, but they had their option to receive less, or more, if the whole quantity was not at the place of delivery, but certainly could not take less, and then refuse to pay for what they actually received.

The case of Patterson vs. Judd, (27 Mo. 563,) relied upon by defendants to sustain him in that position, was a case in which the purchaser sued the vendor, who had delivered a *part*, for not delivering all the logs, which it was alleged by plaintiff he had agreed to deliver, and there was no question in that case analogous to the one raised by the defendants in their fifth instruction.

The case of Marsh vs. Richardson, (29 Mo. 99,) gives no support, whatever, to the proposition contained in that instruction.

It was a suit on a *quantum meruit* to recover for materials furnished and work and labor on the walls of certain buildings. It was held by the court, that although there was a written contract between the parties with which plaintiff had failed to comply, yet, as the work was done and the materials furnished,

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plaintiff could recover their value, taking the contract price as the value of the work if it had been done in pursuance of the contract, and making proper allowance for the difference between that and the value of the work as it was done.

So far as that case bears upon the point we are considering, it is against the appellants' position, and in harmony with an unbroken line of decisions of this court.

The second instruction given by the court for plaintiffs was properly given. What amounts to a delivery in a case like this is well settled.

Upon this subject, it may in general be stated that a sale without delivery, or possession taken by the vendee, passes the title if the property is of such a nature, and so situated, that his possession would be impracticable or inconvenient. So, where the article, though bought in general terms from a large number of the same description, is afterwards selected and set apart, with the assent of the parties, as the thing purchased, it is held to be as much identified and sold as if selected before sale and specified in the contract, and a title to the purchaser passes. (Hil. Sales, 124, 5; Bates vs. Conkling, 10 Wend. 389; Stanton vs. Small, 3 Sandf. 230; Means vs. Williamson, 37 Me. 557.)

With the concurrence of the other judges the judgment of the circuit court is affirmed.

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STATE OF MISSOURI, Respondent, *vs.* GEO. W. BARKER, Appellant.

1. *Indictment—Acquittal of burglary and conviction of larceny—Measure of larceny.*—On an indictment charging defendant in the same count with burglary and larceny, he may be acquitted of the former and convicted of the latter. (See Wagn. Stat. 455, 456. § 19; State vs. Alexander, 56 Mo. 131.) But in such case the degree of larceny or whether the offense be larceny, or merely a misdemeanor, must be determined by the value of the property taken.
2. *Practice, criminal—Evidence—Verdict—Supreme Court will not disturb, when.*—In a criminal proceeding where the evidence is not preserved further than a general statement that it "tended to show" that the crime charged was committed, the verdict of the trial court will not be disturbed above, as against the evidence.

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3. *Larceny—Indictment—Variance in name of owner, no ground of reversal, when.*—In the trial of an indictment for stealing the property of R. C. Stevens, proof that it was the property C. J. Stevens, will not under the statute of Missouri (Wagn. Stat. 1089, § 22), be ground for setting aside a verdict unless the court trying the cause shall find that the variance was in fact "material to the merits of the case, and prejudicial to the defense of the defendant."

Appeal from Clinton County Circuit Court.

J. F. Harwood and Charles Ingles, for Appellant, cited : State vs. Henley, 30 Mo. 509, close of opinion :

J. L. Smith, Att'y Genl., for Respondent, cited : Kell. Crim. L., p. 309, § 573 ; State vs. Smith, 16 Mo. 550 ; State vs. Watson, 31 Mo. 360, and contended that State vs. Henley was not an authority for appellant.

HENRY, Judge, delivered the opinion of the court.

At the April term, 1876, of the Clinton circuit court, defendant and one Kennedy were jointly indicted for burglary in the second degree, and grand larceny. The indictment contained but one count and is in the usual form, and the larceny charged is the stealing of goods, wares and merchandise, specifically described, of the value of fifty dollars, and the property of R. C. Stevens and Thomas K. Smith, into whose store house, it is alleged, defendant burglariously and feloniously broke and entered.

At the same terms, there was a trial of the cause, which resulted in the acquittal of Kennedy and a verdict of guilty of grand larceny against defendant, which fixed his punishment at imprisonment in the penitentiary for two years.

Defendant, in due time, filed his motion for a new trial, which was overruled, and thereupon his motion in arrest, which was by the court also overruled, and judgment was entered against defendant in conformity with the verdict, and from that judgment he has appealed to this court.

The points insisted upon by defendant for a reversal are,

1st. That the court erred in giving for the State the third instruction, which told the jury that defendant could be convicted of larceny, although they might not find him guilty of burglary;

2nd. That the verdict virtually acquits Barker of the burglary, but finds him guilty of grand larceny, when the evidence shows the property found in his possession to have been worth only two dollars;

3rd. That the indictment alleged that the stolen goods were the property of R. C. Stephens and Thomas K. Smith, and the proof was that they were the property of Clifford J. Stephens and Thomas K. Smith.

As to the first point § 19 (Wagn. Stat. p. 456) provides that "if any person in committing burglary, shall also commit a larceny, he may be prosecuted for both offenses in the same count, or separate count of the same indictment, and, on conviction of such burglary and larceny, shall be punished by imprisonment in the penitentiary, in addition to the punishment hereinbefore prescribed for the burglary, not less than two nor exceeding five years."

It will be observed that when one in committing a burglary, also commits a larceny, he is punishable for the larceny, without regard to the value of the property stolen, to the same extent as for grand larceny; whereas, if he had stolen the property and not at the same time committed a burglary—if the property stolen were of less value than five dollars—his offense would have been only a misdemeanor.

While a person may be indicted and charged with both burglary and larceny in one count, if acquitted of burglary and found guilty of larceny, it will still be petit or grand larceny, according to the value of the property stolen.

In the State vs. Alexander (56 Mo. 131). it was held by this court, that on such an indictment, the accused might be acquitted of the burglary and convicted of larceny. In Arch. Crim. Prac. and Plead. vol. 2, p. 329, speaking of burglary, it is said "the intent must be stated, and it must be to commit a felony; and if a felony has been actually committed in the house, the intent may be, and usually is, stated to have been to commit that felony. But it seems that an indictment for burglary may in

this respect be drawn in three ways ; stating the breaking and entry to be with intent to commit a felony, stating the breaking and entry and a felony actually committed, or stating the breaking and entry, with intent to commit a felony and also stating the felony to have been actually committed. The latter is the preferable mode and that always adopted in practice ; for, if you fail to prove the felony committed, you may still convict of the burglary, or, if you fail to prove the intent, &c., you may convict of the felony."

So, it would seem. if section 19 had never been adopted, one could be indicted and charged in the same count with both burglary and larceny, and convicted of either ; and the only change it seems to have made, is, in permitting a conviction for both offenses under one count. There was therefore no error in the third instruction.

With regard to the second point, all of the evidence is not preserved in the bill of exceptions. All that it states is ; " The State proved facts tending to show that the crimes charged in the indictment (except as to the Christian name of R. C. Stevens) was committed as alleged ; and also proved facts tending to show that defendant was guilty."

The possession of a part of the stolen goods of the smallest value, in connection with other circumstances, might clearly fix the guilt of stealing all of the goods upon defendant. As the evidence is not preserved in the bill of exceptions, we cannot undertake to say that it did not support the verdict of the jury.

As to the third and last point, the indictment charges that the goods stolen were the property of R. C. Stevens and Thomas K. Smith, and the proof was that they were the property of Clifford J. Stephens and Thomas K. Smith.

In an indictment for larceny, the name of the owner of the property stolen must, if known, be accurately stated ; but § 22, Art. 4, ch. 3 (Wagn. Stat. 1089), provides that " whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the Christian name and surname," &c., " or in the ownership of any property named or de-

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scribed therein, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case, and prejudicial to the defense of the defendant." There was a variance between the allegation of ownership and the proof, and such a variance, as at common law would have been fatal, but the section above quoted cures the variance, unless the court trying the case shall find that "it was material to the merits of the case, and prejudicial to the defense of the defendant."

In this case the court has not so found, but we are to assume, from the instructions given, that the variance was not regarded by the court as material to the merits of the case.

With the concurrence of the other judges, the judgment is affirmed.

—O—

WILLIAM McMILLAN, Respondent, *vs.* A. B. PARKELL, Appellant.

1. *Evidence*.—*Note signed by one as principal*.—*Proof that the contract was that of surety*.—When one signs an obligation describing himself as principal, he renounces his right as surety, and parol evidence showing that his agreement was that of surety only, and that his liability was extinguished by reason of an extension granted to the principal without his knowledge, is inadmissible, as varying the terms of his written contract. And more especially is this true where he expressly stipulates in the instrument that no extension of time shall affect his liability. And it is immaterial in such case that the instrument signed is a note and not a specialty.

Appeal from Jasper Court of Common Pleas.

E. J. Montague, for Appellant, cited: *Mechanic's Bank vs. Wright*, 53 Mo. 153; *Foster vs. Wallace*, 2 Mo. 231; and contended that the reasoning in the case of *Picot vs. Signiango*, 22 Mo. 587, following the case of *Spriggs vs. The Bank of Mount Pleasant*, 10 Pet. 257, was founded upon a sealed instrument.

W. H. Phelps, for Respondent, cited: *Sprigg vs. Mt. Pleasant Bank*, 10 Pet. 257; *Id.* 14 Pet. 201; *Picot vs. Signiago*, 22 Mo. 587.

HOUGH, Judge, delivered the opinion of the court.

This was an action against the defendant founded upon the following instrument of writing:

\$150.

Carthage, Mo., December 18, 1873.

Six months after date we, each as principal, jointly and severally promise to pay to the order of Wm. McMillan, in Carthage, Mo., one hundred and fifty dollars for value received, with interest at the rate of ten per cent. per. annum from maturity. We do waive all exemption of homestead and other property from execution under the laws of this State; nor shall any delay or extension of time of demand of payment affect our liability hereon, and we hereby agree to pay a reasonable attorney's fee in case this note has to be collected by law.

H. H. WOODMANSEY.

A. B. PARKELL.

The defendant set forth in his answer that he entered into the foregoing obligation as surety for H. H. Woodmanson, who was the principal therein, and that plaintiff well knew, at the time the same was executed, that defendant signed it only as surety; that at the maturity of said obligation the plaintiff did, for a valuable consideration paid to him by the said Woodmanson, and without the knowledge or consent of the defendant, extend the time of payment of said obligation until the first day of January, 1875.

The defendant offered to prove the foregoing facts at the trial, but the court rejected the testimony. There was a verdict and judgment for the plaintiff, and the defendant has appealed.

The court committed no error in rejecting the testimony offered. It is clearly competent for a surety to renounce the privileges which the law confers upon him as such. He may, by assenting to an extension of time granted to his principal, waive his right to a discharge on account of such extension. So he may, at the

time of entering into a contract, waive in advance the legal protection to which he would be entitled as surety, and agree that he may, throughout the transaction to which he becomes a party, be held to the legal liability of a principal. This was undoubtedly done in the contract on which the present suit was founded. The defendant expressly bound himself "as principal," and in the language of Judge Scott, in the case of *Picot vs. Signiago* (22 Mo. 587); "To hold that the defendant is not bound as principal in this contract, is tantamount to declaring that one who really occupies the relation of surety in a contract cannot be bound as principal—a proposition for which there is no support in the law."

In that case, as in this, the surety bound himself "as principal." There the contract was a specialty, but we can see no difference in principle in the two cases. In both cases important rights are surrendered by the voluntary act of the surety.

To permit a party to a written instrument, *who expressly contracts therein "as principal,"* to vary his liability by showing that he was in fact only a surety, and known to be such by the obligee, would be in contravention of the well established rule, that parol testimony is inadmissible to alter, or vary, the terms of a written contract.

In the case of *Claremont Bank vs. Wood* (10 Vt. 582) the suit was founded on a promissory note, the language of which was: "For value received, we, *each as principal*, jointly and severally promise to pay," etc. Judd, one of the defendants, who was a surety, claimed that his liability was extinguished by reason of an extension of time granted by the payee to the principal in the note, without his knowledge or consent. The court said: "It could not have been the object of these expressions to signify merely that each signer assumed the liability of a principal in the first instance; for such a liability is always incurred by the respective signers of promissory notes in ordinary cases, even though one of them should affix the word *surety* to his signature. The reason is, that they all promise in the same terms, which must have the same import and effect as applied to each of the signers. Another motive is sufficiently apparent. As the

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plaintiffs would have been bound to respect the rights of Judd, as a surety, had these words been omitted, the evident design of their introduction was, on the one side, to avoid the embarrassment of such an obligation, and, on the other, to waive the right of insisting upon it. And since Judd has seen fit expressly to avow himself a principal in the note, and thereby, so far as the plaintiffs were concerned, to renounce the character of a surety with the privileges incident to it, we are not at liberty to absolve him from the consequences. To hold him still entitled to those benefits, which he openly disclaimed at the time of entering into the contract, would be to vary and control its intended operation, and, in effect, to enforce a contract which the parties never made."

A further reason for rejecting the testimony is to be found in the express stipulation of the defendant, that no extension of the time of payment should affect his liability. The appeal is without merit, and the judgment will be affirmed, with ten per cent. damages. The other judges concur.

—O—

MARK JACKMAN, Respondent, *vs.* LEWIS W. ROBINSON, *et al.*,
Appellants.

Equity—Action to set aside deed of intestate for fraud and subject property to sale—Parties to suit, who are and who are not proper—Bill—Allegations showing equity—Demurrer.

1. In proceedings by the creditor of an estate to subject to the payment of his debts, land alleged to have been conveyed away by the intestate in fraud of his creditors, neither the administrator nor the other creditors, nor the fraudulent grantees of the land who have parted with their interest are proper parties. But the grantees who have not so conveyed and who claim the property must be joined. And where a grantee is a married woman her husband should be made party. (Wagn. Stat. 1001. § 8.)
2. In such suit the petition alleging that judgment has been obtained on plaintiff's demand against the estate, that the judgment is unpaid and the estate wholly insolvent, is not demurrable as showing a legal remedy. On the other hand the proceeding begun by him is plaintiff's only remedy.

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Appeal from Howard County Circuit Court.

S. C. Major, Jr., for Appellants, cited: *Bump. Fraud. Con.* 516, 522, 523; *Coates vs. Day*, 9 Mo. 300; *Merry vs. Freeman*, 44 Mo. 518; *McDowell vs. Cochran*, 11 Ill. 34; *Peasley vs. Barney*, 1 Chip. (Vt.), 335; *Phares vs. Leachman*, 20 Ala. 678; *Snodgrass vs. Andrews*, 30 Miss. 88; *Barton vs. Bryant*, 2 Ind. 189; *Waddell vs. Williams*, 37 Tex. 351; *Bachman vs. Sepulveda*, 39 Cal. 688; *Shields vs. Barrow*, 17 How. [U. S.] 130; *Barney vs. Baltimore*, 6 Wall. 280; *Butler vs. Jaffray*, 12 Ind. 510; *Henderson vs. Dickey, et al.*, 50 Mo. 164; *Bobb vs. Woodward*, 50 Mo. 101; *Herrington vs. Herrington*, 27 Mo. 561; *Ryland vs. Callison*, 54 Mo. 513; *Gentry vs. Robinson*, 55 Mo. 260; *Street vs. Goss*, 62 Mo. 226; *Titerington vs. Hooker*, 58 Mo. 593; *Pearce vs. Calhoun*, 44 Mo. 271; *Sto. Eq.* § 370; *Bisp. Eq. p.* 474, § 534; *Bennett vs. McGuire*, 58 Barb. 625; *Gaylords vs. Kelshaw*, 1 Wall. 81; *Miller vs. Jamison*, 24 N. J. Eq. 44; *Huff vs. Price*, 50 Mo. 228; *Beal vs. Harrison*, 38 Mo. 435; *Reaume vs. Chambers*, 22 Mo. 36; *Merritt vs. Merritt*, 62 Mo. 150.

Herndon & Herndon, for Respondent, cited: *George vs. Williamson*, 21 Mo. 190; *Merry vs. Freeman*, 44 Mo. 518; *Cheeley's Adm'r vs. Wells*, 33 Mo. 1061; *Pattern vs. Cary, et al.*, 57 Mo. 118; *Stivers vs. Home*, 62 Mo. 473.

NORTON, Judge, delivered the opinion of the court.

This is a proceeding in equity by plaintiff as a creditor of one John F. Rucker, deceased, to subject certain lands, described in the petition, to sale for the payment of his debt. The petition alleges that said Rucker, in his lifetime, was indebted to plaintiff by two promissory notes, which after the death of Rucker were allowed against his estate, amounting to the sum of \$410.47; that said debts were contracted in 1860, and that said Rucker, in 1866, purchased the lands sought to be subjected to sale, paying therefor the sum of \$2,500, six hundred dollars of which was furnished by the wife of said Rucker; that John F. Rucker, at the time of said purchase, was insolvent, and for the purpose of de-

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frauding his creditors caused said land to be conveyed, without any consideration, to one Jonathan Rucker, with a secret trust for said John F. Rucker, his wife and children; that said Jonathan had knowledge of the fraud, and in 1867, a short time previous to the death of said John F., conveyed said lands to him in trust for his wife and children; that said John F. died in 1867 and his estate was administered upon by one Wm. H. Rucker, to whom after his administration all the children and heirs at law of said John F. deceased, except the defendant, Caroline Miller, conveyed, by deed of quit-claim, all their interest in said land; that said William H., at the time he accepted said conveyance, knew that the lands had been fraudulently conveyed to the said Jonathan Rucker, for the purpose of defrauding the creditors of said John F., deceased; that defendant, Robinson, afterwards, in March, 1868, procured a conveyance of the interest of Jane Rucker, widow of said John F., in said lands, and also in September, 1868, procured a conveyance from said William H. Rucker, to whom all the heirs and children of said John F. had conveyed except defendant, Caroline Miller, to be made to defendant, Robinson, in trust for said Robinson's wife and children; that said conveyance was made without any consideration, and was accepted by defendant, Robinson, for the purpose of defrauding the creditors of said John F. Rucker, and that Robinson had knowledge of the fact that said John F. Rucker was insolvent at the time said land was purchased, and also at the time of his death. The petition fully charges the insolvency of the estate of the said John F. It alleges that nothing has been paid on his claim and that there was nothing to pay with. The defendants demurred to the petition, which demurrer was overruled by the court and a decree entered for the sale of the land.

It is insisted that the court erred in overruling the demurrer, because it appeared on the face of the petition that neither the administrator of John F. Rucker, deceased, nor the fraudulent grantees, nor all the creditors of said John F. were made parties.

We do not think that in a proceeding of this character the purpose of which is to attack and avoid the fraud of the intestate, the administrator is either a necessary or proper party.

It has been held by this court that an administrator cannot impeach the fraudulent conveyance of his intestate ; that he has no interest in the matter and is not a necessary party to suit brought for that purpose ; that such a controversy is one purely between the creditor and the administrator. (Merry vs. Freeman, 44 Mo. 518 ; George vs. Williamson, 26 Mo. 190 ; Brown vs. Finly, 18 Mo. 375 ; Cheely's Adm'r vs. Wells, 33 Mo. 106.)

It is urged as a further objection that all the creditors of John F. Rucker, deceased, were necessary parties, and that the petition was defective in not making them parties. In George vs. Williamson, *supra*, it was held, Judge Napton speaking for the court, that, "when a fraudulent conveyance is made, the creditors or any one of them may file a bill in equity to have the same set aside ; and in such cases it seems to be the better opinion that the creditor who first files his bill obtains a priority and is entitled to be first paid from the proceeds of the sale if a sale is decreed." The above rule seems to be founded on the principle that the creditor or creditors whose diligence, after legal remedies are exhausted, pursues the property of a fraudulent debtor into a court of equity, are entitled to a preference as the reward of their vigilance. If the creditor whose execution is returned unsatisfied, and whose remedies at law have been fruitless and unavailing, prosecutes the race of legal diligence by the commencement of a suit to defeat a fraud and enforce the sale of property held by a fraudulent conveyance he ought to reap the benefits resulting from his diligence. (Weed vs. Pierce, 9 Cow., 721 ; Corning vs. White, 2 Paige, 567.)

We do not think that the fraudulent grantees who had parted with their interest in the land sought to be subjected to sale, and who had conveyed the same to defendant, Robinson, as trustee for his wife and children, were necessary parties. They claimed no interest in it and could not be affected by any decree which might be rendered in the case.

It is said that the petition discloses a legal remedy for the collection of plaintiff's debt, and for that reason the demurrer to it ought to have been sustained.

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We think it discloses no such remedy. The petition alleges that judgment was obtained on plaintiff's demand against the estate of Rucker; that the estate was wholly insolvent; that judgment had not been paid and that there was nothing to pay with. He could proceed no further at law, for there was nothing to proceed against.

In the case of *George vs. Williamson*, *supra*, it was held that a probate court in such cases has no jurisdiction to order the sale of the land, fraudulently conveyed by intestate for the payment of debts, even though such application for sale was made by creditors through the administrator. Plaintiff's only remedy is the one to which he has resorted in this case. While, as before stated, fraudulent grantees who have parted with their interest are not necessary parties, yet it is necessary to make all such grantees who have not parted with their interest, and who claim under the fraudulent conveyances sought to be impeached, parties to the proceeding.

This has not been done in this case so far as Caroline Miller, one of the defendants, is concerned. It appears from the petition that Caroline Miller, who obtained an interest under the conveyance alleged to have been made by Jonathan Rucker to John F. Rucker, was the wife of one Miller, and she is made a party without the husband being joined with her. She is sued without her husband being joined with her, and in this respect the petition is defective, and the demurrer to it on that ground was well taken.

Wagn. Stat. p. 1001, provides that where a married woman is a party her husband must be joined with her in all actions except those in which the husband is plaintiff only, or the wife plaintiff and the husband defendant.

It was held in *Latshaw, et al. vs. McNees, et al.* (50 Mo. 384,) that a married woman cannot now be sued alone, except when the husband sues her.

Judgment reversed and cause remanded, the other judges concur.

Hann. & St. Joe. R. R. Co. v. State Board of Equalization.

HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Relator, vs. STATE BOARD OF EQUALIZATION, Respondent.

1. *State Board of Equalization—Legislation not necessary to effectuate constitutional provision regarding.*—The governor, State auditor, treasurer and secretary, and attorney general are constituted the State board of equalization by virtue of art. X, § 18, of the present Constitution, and authorized to act without any legislation to that effect.
2. *Railroad—Apportionment of taxation to counties, etc., constitutional.*—Section 8 of the act of March 15, 1875, (Sess. Acts 1875, p. 121) under which the amount of the "land contracts" of the Hannibal & St. Joseph Railroad Company was apportioned to the counties, cities and towns along the route of the road and its branches, is not unconstitutional.
3. *Taxation—Power of legislature regarding*—The taxing power of the legislature is subject to no restrictions or limitation outside of the United States and State constitutions.
4. *Certiorari—State Board of Equalization—Evidence outside of record not subject to review.*—*Certiorari* is a common law writ, and can bring up for review only such facts as appear on the face of the record. Hence, where this writ is invoked against proceedings by the State Board of Equalization for the assessment of railroad property, inasmuch as the evidence below touching its value is not required to be preserved in the record, it cannot be examined, nor the appraisement of the board based thereon, disturbed by the Supreme Court.
5. *Board of Equalization—Power under act of 1875 to assess without hearing evidence—Power to assess under Const. art. X, § 18.*—Under § 7 of the act of 1875 (Sess. Acts 1875, p. 121) the State board of equalization had power to equalize, adjust and assess railroad property without the hearing of testimony. And it had the power to assess as well as to equalize and adjust under § 18, art X, of the present Constitution. (As to the construction of § 18 Napton and Hough J. J., did not concur.)

Certiorari to review Assessment of State Board of Equalization.

James Carr, for Relator.

I. The State senate was the proper board of equalization for 1876, instead of the governor and other State officers under the new Constitution. (Wagn. Stat. 1160, § 9; § 1, Schedule to the new Constitution. Dwar. Stat. 568.)

II. The Constitution does not execute itself *proprio vigore*. Legislative action is necessary to have that effect. (St. Jo. & Denver City R. R. Co. vs. Buchanan Co., 39 Mo. 485; Groves vs. Slaughter, 15 Pet. 449; Cool. Const. Lim., 35, 36,

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78, 79; U. S. vs. Bevens, 3 Wheat. 336; Const. Conv., by Jamison, p. 83, § 427; *Idem.* § 434; Luther vs. Borden, 7 How. 1; Websters' Works, vol. 6, p. 221.)

III. The respondents acted as an *original* assessing board. This they had no right to do. They had only authority "to adjust and equalize" the property of the relator. (§ 18, art. X, of Constitution.)

IV. The act of the General Assembly upon which the resolution of the respondents apportioning the land contracts was based is *unconstitutional*. (§ 11, art. X; § 3, *Ibid*; § 21, art. II; Livingston County vs. Hannibal & St. Jo. R. R. Co., 60 Mo. 516; Wells vs. City of Weston, 22 Mo. 384; St. Charles vs. Nolle, 51 Mo. 122; Cool. Const. Lim., 499; Morford vs. Unger, 8 Iowa, 82; Langworthy vs. City of Dubuque, 13 Id. 86; Latrobe, Trustee, vs. Mayor of Baltimore, 19 Md. 13; Johnson vs. Oregon City, 2 Oregon, 327; Johnson vs. City Council of Oregon City, 3 Id. 13; Portland, Saco and Portsmouth R. R. Co. vs. City of Saco, 60 Me. 196.)

V. The *situs* of personal property and choses in action is where the owner resides. The domicile of the relator is in the city of Hannibal. The land contracts are choses in action. They are properly taxable there. (§ 6, p. 1159, Wagn. Stat.; State *ex rel.* Taylor, Adm'r, vs. St. Louis County Court, 47 Mo. 594; St. Joseph *ex rel.* vs. Saville, 39 Id. 460; City of Lexington vs. Aull, 30 Id. 480; Wilkey vs. City of Pekin, 19 Ill. 160; Sangamon & Morgan R. R. Co. vs. County Court of Morgan, 14 Id. 163.)

J. L. Smith, Atty Gen'l, for Respondent.

I. Under the provisions of § 8, p. 121, Acts 1875, the board had authority to apportion to the counties, municipal townships, cities and incorporated towns along the line of the road the land contract funds, which were valued according to the return of the company. (Washington Co. vs. Iron Mt. R. R., 58 Mo. 372; State Railroad Tax Cases, 2 Otto, [U. S.], 607-611; Delaware Railroad Tax Case, 18 Wal. 208; Erie Railroad Co. vs. Penn. 21 Id. 492; 18 Wallace 2.)

II. The governor, State auditor, State treasurer, secretary of State and attorney general constituted the State board of equalization, from and after the adoption of the Constitution of 1875, and had full authority to assess, adjust and equalize all the railroad property of the State for the year 1875. (See § 18, art. X, of the Const., also Act 1875, § 7, p. 121; also Cent. Law Jour. vol. 3, No. 45.) And that section executed itself *proprio vigore*. Under the Act of 1875 the senate was the board, and the constitution simply transfers their powers to the executive.

III. Assuming but not conceding that said officers did not constitute the State board *de jure*, yet their action is good as *de facto* officers, and one binding on relators. (Harbaugh vs. Winsor, 38 Mo. 327; State vs. Dougherty, 45 Mo. 294.)

IV. Section 6—Wagn. Stat. 1159—is repealed by § 8, p. 121 of the acts of 1875, in so far as it applies to railroad property.

V. The power of equalization being conferred upon the board to be exercised upon their judgment and belief of the facts in each particular case, their discretion cannot be controlled or reviewed on *certiorari*. (Smith vs. Bd. Supervisors, 30 Ia. 531; 1 Bouv. Law Dic. 215.)

The board was not required to certify up the testimony, and there being no law to preserve the testimony by bill of exceptions or otherwise, this court can only look at the record the board was required to make and preserve. (Cent. P. R. R. vs. Placer Co., 34 Cal. 352; S. C. 32 Cal. 582; People *ex rel.* Board etc., 14 Cal. 479; 8 Abb. [N. Y.] Prac. 277; Jordan vs. Hayden, 36 Iowa, 9; Smith vs. Bd. Supt., 30 Iowa 531; Everett vs. C. R. & Mo. R. R. Co., 28 Iowa 417; 117 Mass. 564; 112 Mass. 206, 218; 109 Mass. 270; 38 N. Y. 377; 32 N. Y. 365; 35 N. Y. 558; 34 N. Y. 343; 28 Wis. 270; 29 Wis. 444.)

VI. In reference to taxation the constitution of the State is not so much to be regarded a grant of power, as a restriction or limitation of power. (Const. Mo. § 1, art. X; Glasgow vs. Rowse, 43 Mo. 489; McCulloch vs. Maryland, 4 Wheat. 428; Cool. Const. Lim. 479 *et seq.*)

And no provision of the Constitution of this State, or of the United States, inhibits the legislature from enacting that rail-

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way property shall be valued by the assessing power, and that valuation apportioned along the entire line of the railway according to the rule prescribed in section 8 of act of March 15th, 1875, for the purpose of taxation.

HENRY, Judge, delivered the opinion of the court.

On the 5th day of December, 1876, the relator filed in this court the following petition for a writ of *certiorari* to the State Board of Equalization in the above entitled cause, viz: "Plaintiff, who sues at the relation of the Hannibal and St. Joseph Railroad Company, states that under and by virtue of an act of the General Assembly of the State of Missouri, entitled 'An act to incorporate the Hann. & St. Jo. R. R. Co.,' approved February 16, 1847, the relator became, and ever since has been and still is a railroad corporation in said State, and as such said relator was authorized to build and maintain a railroad from the town (now city) of Hannibal in said State to the town (now city) of St. Joseph in said State; and also to build and maintain such branches as the relator might deem to its interest, and the public convenience might require; that in pursuance of said charter, the relator did build, and in the year 1859 it did complete, a railroad from said city of Hannibal to said city of St. Joseph called and known as the Hann. & St. Jo. R. R., and has been ever since, and still is, maintaining and operating the same; and in the year 1867 said relator became the owner of the Quincy and Palmyra branch of said Hann. & St. Jo. R. R.; and in the year 1870, said relator became the owner of the Kansas City and Cameron branch of said Hann. & St. Jo. R. R.; and said relator has been ever since, and still is, maintaining and operating said branches; that under said charter of the relator its property was exempt from the payment of all State and county taxes; but under the act of the General Assembly of said State, entitled 'An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hann. & St. Jo. R. R.,' approved September the 20th, 1852, said exemption was modified so as to require said

relator to pay into the State Treasury, on the first Monday in December of each year, after the said Hann. & St. Joe. R. R. was completed and opened and a dividend declared, a sum of money equal to the amount of the State tax on other real and personal property of like value, for that year, upon the actual value of the road-bed, buildings, machinery and engines, cars and other property of said relator, which shall be as a consideration to the State for the execution of the trust reposed in the State by the act of Congress of the United States, approved June 10, 1852, entitled 'An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State;' and for the purpose of ascertaining the value of the same, it shall be the duty of the president of the relator, on the first day of February in each year, after the said road is completed, opened and put in operation, and declares a dividend, to furnish to the Auditor of the State a statement, under oath, made before and certified by some officer authorized to administer oaths, the actual value of the road-bed, buildings, machinery, engines, cars and other property of said relator; and from said statement, so furnished, the auditor shall charge said relator with the amount appearing to be due the State, according to the statement furnished, as herein required, by the president of said relator.

Plaintiff further states, that in and by the fourth section of said act of the General Assembly of said State, the relator was required to accept the provisions of said act within sixth months after the passage thereof; said acceptance to be executed by said relator under its corporate seal, and filed in the office of the Secretary of State, which was done on the terms, in the manner and within the time required.

Plaintiff further states, that in pursuance of said act of the General Assembly of said State, on the first day of February, 1876, the president of said relator furnished to the State Auditor a statement, under his oath, made before and certified by an officer authorized to administer oaths, of the actual value of the road-bed, buildings, machinery, engines, cars and other property of the relator on said first day of February, 1876, and

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filed said statement in the office of said State Auditor; that the aggregate valuation of all of said relator's property, on said first day of February, 1876, was the sum of \$5,707,342.75, as shown by said statement returned to and filed with said Auditor as aforesaid; that under said act it was the duty of said State Auditor, from said statement, to charge said relator with a sum of money equal to the amount of the State tax on other real and personal property of like value for that year, upon the actual value of the road-bed, buildings, machinery, engines, cars and all other property of said relator; that said State Auditor did not, from said statement, charge the relator with a sum of money equal to the amount of the State tax on other real and personal property of like value for that year, upon the actual value of the road-bed, buildings, machinery, engines, cars and all other property of the relator, as it was, by said act, his duty to do.

Plaintiff further states that ever since the completion of said Hann. & St. Jo. R. R. as aforesaid, the chief office and place of business of said relator has been and still is in the city of Hannibal, in the county of Marion and State of Missouri; that in the itemized statement returned to and filed with said State Auditor, by said president of the relator, there is an item for 'land contracts,' (face) \$2,560,608.88; that said contracts are for lands granted to the State of Missouri by said act of congress, and by said act of the General Assembly of said State to said relator, as aforesaid, to aid in building said Hann. & St. Jo. R. R., and by which contracts the relator had agreed to sell and convey the lands embraced in said contracts to the purchasers thereof, upon the full payment of the purchase money therefor, said lands having been sold on time and the title withheld until the full payment of said purchase money should be made.

Plaintiff further states, that on the second Tuesday in May, 1876, said State Auditor laid said statement of the President of the relator, furnished to him as aforesaid, before the respondents as the State Board of Equalization, and the respondents, as the State Board of Equalization, assumed to have jurisdiction over railroad property in said State, and over the property of the relator, and also to have all the powers and authority of an original

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assessing board over said property; and the respondents proceeded to perform the duties of an original assessing board over the property of the relator, and between the second Tuesday in May, 1876, and the 20th day of June following, the respondents, acting as the State Board of Equalization, heard testimony in regard to the value of the relator's property, and then fixed such valuation upon said property as, in their judgment, should be fixed thereon for taxation purposes, to-wit: at the sum of \$7,800.104.05; and in fixing said valuation the respondents arbitrarily fixed it according to their own opinion of what said valuation should be, without having personal knowledge of the value of the relator's property, and without having made any examination and inspection of said property for the purpose of ascertaining said value, and ignoring the valuation in almost every particular which the president of the relator had placed and fixed upon said property in said statement returned to and filed with said State Auditor as aforesaid; and likewise ignoring the testimony of the witnesses introduced before the respondents, in regard to the value of the relator's property, and which testimony fully sustained the valuation of the relator's property which had been placed thereon by the president of the relator as aforesaid in his statement returned to and filed with the State Auditor as aforesaid, and proves that said president had placed, fixed and returned said property at its actual cash value.

Plaintiff further states that on motion of Mr. McGrath the respondents adopted the following resolution, viz: 'Resolved, that the amount of land contracts of the Hann. & St. Jo. R. R. Co. be apportioned to counties, cities and incorporated towns along the line of the main and branch lines of said road.'

Plaintiff avers that the respondents had no jurisdiction over the property of the relator to assess, and adjust and equalize it for taxation purposes.

Plaintiff avers that if the respondents had jurisdiction over the relator's property, it was only to adjust and equalize it, and not to act as an original assessing board. And plaintiff avers that the respondents in acting as an original assessing board of the

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relator's property, as hereinbefore stated, exceeded their jurisdiction, and that the assessment thus made is null and void.

Plaintiff avers that the respondent did not make said assessment according to the evidence adduced before them by the relator ; but they, without evidence and contrary to evidence, arbitrarily placed and fixed such valuation upon the relator's property as in their opinion should be placed and fixed upon said property, for the purpose of raising a given amount of revenue, without knowing the value of said property, and without having made any examination and inspection of said property for the purpose of ascertaining said value.

Plaintiff avers that the excess in the valuation of the relator's property, over and above the valuation placed and fixed upon it by the president of the relator as aforesaid, is unjust, excessive, erroneous and illegal.

Plaintiff avers that the respondents, in apportioning the amount of the land contracts of the relator to the counties, cities and incorporated towns, along the main line of the Hann. & St. Jo. R. R. and branches, acted without the authority of any law ; and plaintiff further avers, that said contracts were and are taxable only in the city of Hannibal, in the county of Marion, in said State.

Plaintiff further states that the respondents, whilst acting as the State Board of Equalization as aforesaid, caused to be kept, and kept, a fair and full record of its proceedings and decisions, and caused the same to be signed officially by the president and secretary thereof, and on the 20th of June, 1876, filed said record in the office of Thomas Holladay, as the State Auditor of the State of Missouri on its adjournment (said State Board of Equalization having adjourned on said day), and said record has been ever since, and still is, on file in the office of said State Auditor.

Plaintiff further states that said Thomas Holladay, as State Auditor of said State, on the receipt of the proceedings of said State Board, charged to the relator on the valuation of the relator's property, as fixed by said State Board of Equalization as aforesaid, the amount of taxes found to be due the State on each of the several

funds, to-wit: with the sum of \$15,600.15 for State revenue tax for the year 1875, and with the sum of \$15,600.15 for State interest for the same year; and on the 20th day of June, 1876, said Thomas Holladay, as State Auditor aforesaid, certified the action of said State Board, together with the amount of taxes due to the State upon each fund to the secretary of the relator and said Thomas Holladay as State Auditor aforesaid certified said proceedings of said State Board to the clerks of the county courts of all the counties in said State, in which the relator's property was and is located, as required by the statute in such cases.

Plaintiff further states that said valuation of the relator's property by said State Board of Equalization was placed and fixed at the sum of \$7,800,104.05, under and in pursuance of the statutes of said State in regard to the assessment of railroad property and the collection of taxes thereon.

Plaintiff avers that the excess of said valuation over and above the valuation placed and fixed upon the relator's property by the president of the relator as aforesaid, viz; the sum of \$2,092,761.30, is excessive, erroneous, illegal and unjust.

Plaintiff further avers that said proceedings of said State Board of Equalization were altogether outside of the course of the common law, and likewise outside of any statutory judicial proceedings; and that no writ of error lies to such proceedings from this or any other court, and no appeal is provided by law or allowed to this or any other court.

Plaintiff further states that at the time of the respondents making said assessment and valuation of the relator's property as hereinbefore stated, Charles H. Hardin was, and still is, the governor of the State of Missouri; Michael K. McGrath was, and still is, the Secretary of the State of Missouri; Thomas Holladay was, and still is, the State Auditor of the State of Missouri; Joseph W. Mercer was, and still is, the State Treasurer of the State of Missouri, and John A. Hockaday was, and still is, the Attorney General of the State of Missouri, and they sat and acted as the State Board of Equalization of said State.

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Plaintiff therefore prays this court to issue the State's writ of *certiorari* directed to the respondents in their official capacity as hereinbefore stated, and to Thomas Holladay as State Auditor, as the custodian of the record of the proceedings and decisions of said State Board of Equalization, as hereinbefore stated, requiring a true, full and complete copy of said State Board of Equalization in regard to the assessment and valuation of the relator's property; and also of the statement of the president of the relator's property returned to and filed with said State Auditor as hereinbefore stated; and also the evidence introduced before said State Board of Equalization in regard to the value of said property and all other acts and proceedings of said State Board of Equalization in regard to said assessment and valuation, and have said copy returned to this court on or before the — Monday in December, 1876, in order that this court may adjudicate upon the legality of said assessment and valuation of the relator's property as made by said State Board of Equalization, and may make such other and further adjudications and orders thereon as right and justice may require."

"JAMES CARR,
Attorney for Relator."

On the 8th day of December following, this court ordered a writ of *certiorari* to be issued returnable on the 16th of December, and on that day respondents made their return. To the return relator filed exceptions which were sustained, and on the following day they filed an amended return, to which exceptions filed by relator were also sustained. On the 25th day of January, 1877, the respondents filed the following second amended return, viz :

"And now come the respondents, and for their amended return and answer to the rule awarded against them in the above entitled cause, state that they, acting as a State Board of Equalization in the discharge of their duties as such under the laws of this State, kept a journal of their proceedings which is filed in their return to said writ of *certiorari*; that they were not required by law, and did not preserve by bill of exception or otherwise, all the testimony taken by them and upon which their said

action was based, and that they have not now and never have had in their possession, custody or under their control, any testimony taken by them other than as heretofore has been returned in this case, and that it is out of their power to return all of said testimony and evidence; and that everything that remains of record before them has already been returned in this proceeding.

“STATE BOARD OF EQUALIZATION,”

By J. L. SMITH, Attorney General.

In their first return to the writ respondents denied that the valuation of the property of relator, fixed and returned by its president for the taxes for 1875, was correct, and aver that it was far below the cash value of the said railroad and property of relator.

They denied that they assessed, adjusted and equalized said property, without first having evidence, or without any knowledge of its value, or that they made no examination of the property in order to ascertain its value, and allege that they examined witnesses well informed in regard to the value of the property, and heard all the evidence offered by relator on the subject, and that the assessment, equalization and adjustment of said property was made in accordance with the evidence.

Relator contends that the State Senate, and not respondents, was the Board of Equalization for 1876.

Section 18, art. 10 of the new Constitution provides that; “there shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Secretary of State, and Attorney General. The duty of said Board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law.”

It is insisted, that this section does not constitute the officers named a board of equalization, but that legislation is necessary to give it effect. The word “shall,” argues the counsel, “imports futurity.” Whether it does or not depends upon the subject of the sentence, and the context with which it is related.

What it means in the 18th section will more fully appear on an examination of the laws, which existed prior to the adoption of

the constitution, in regard to equalization and adjustment of property for taxation.

When the constitution was adopted there was a State Board of Equalization composed of the State Senate. There were acts of the General Assembly prescribing the powers and duties of the Board. Sec. 18, Art. 10, provides that the Board "shall perform such other duties as are or may be prescribed by law." It will not be contended that the word "are" imports futurity, and this board, composed of the governor and other State officers, shall perform such duties as *are* prescribed by law at the adoption of the constitution. If the intention had been that the legislature was to pass an act to create this board, is it to be supposed that such phraseology would have been employed? Besides, where is the necessity for a legislative enactment, when the constitution designates the members of the board and prescribes its duties?

The constitution provides sec. 1, art. 5, that "the executive department shall consist of a governor," etc. Section 4, "The Supreme executive power shall be vested in a chief magistrate," etc.

Article 6, sec. 1, "The judicial power of the State shall be vested in a Supreme Court, etc." Is there any legislation required to make the executive department "consist of a governor, etc.," to vest in the supreme court the judicial power of the State, or to vest the Supreme executive power in a chief magistrate, etc.?

The duties of the old board under the law are immediately imposed by the constitution upon the new board. In the case of *Ketchum vs. The Pac. R. R.*, reported in the *Central Law Journal*, vol. 3, No. 45. p. 726, Judge Treat held "that the Board of Equalization under the new constitution became at once the only board thereafter for that purpose, and was clothed with all the powers and duties of the board for which it was substituted, and that its acts are valid and obligatory."

The counsel argues that the first section of the Schedule continues the old board in existence. That portion of the section bearing upon this point is as follows:

"All laws in force at the adoption of this constitution not inconsistent therewith, shall remain in full force until altered or repealed by the General Assembly." The law creating the old board is inconsistent with the new constitution, for that makes the senate, and this makes the State officers, the board, and our answer to the position of relator is simply a repetition of our views as to the proper construction of section 18.

It is contended that the act of the General Assembly, upon which the resolution of the board apportioning the tax on the land contracts of the company was based, is unconstitutional.

In support of this position we are referred to numerous authorities to the effect that the *situs* of personal property and choses in action is where the owner resides, and they are properly taxable there.

The authorities fully establish that proposition, but taxing the property and apportioning taxes are two different procedures. In *Washington County vs. St. L. & I. M. R. R. Co.*, (58 Mo. 376) Judge Lewis delivering the opinion of the court makes the distinction in commenting on section eight of the act of 1871, which is substantially the same as section eight of the act of 1875. He remarks: "The aggregate valuation for each company's property being thus adjusted, and being also equalized upon a just ratio with all others, the eighth section introduces a process of subdivision. There is neither adjusting nor equalizing, but apportionment only. This, except as to lands, workshops, depots and other buildings, wholly ignores local values. It is based upon 'the ratio which the number of miles of such road completed in such county shall bear to the whole length of such railroad.' Thus one county may contain railroad property worth far more than that within another, and may yet receive a smaller apportionment for taxation by reason of having a less number of miles of road completed within its limits."

In the State Railroad tax cases, (2 Otto, U. S. 601) the court gives a synopsis of the act of the legislature of Illinois of March 30, 1872, and says; "The theory of the system is manifestly to treat the railroad track, its rolling stock, its franchise and its capital as a unit for taxation, and to distribute the assessed value

of this unit according as the length of the road in each county, city and town, bears to the whole length of the road."

Again, on page 607: "Another objection to the system of taxation by the State is, that the rolling stock, capital stock and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city or town, but the one where it is situated.

"The objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of the owner. It may be doubted, very reasonably, whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road."

"But after all, the rule is merely the law of the State which recognizes it."

"Like all other laws of a State, it is, therefore, subject to legislative repeal, modification or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation."

The same general proposition is maintained in Delaware Railroad tax case, 18 Wall. 208; Erie Railroad vs. Penn., 21 Wall. 292, and directly in point is the case of Washington County vs. I. M. R. R. Co., 58 Mo. 372.

The taxing power belongs to the legislature, and is subject to no restrictions or limitations outside of the United States and State Constitutions. (Dwarris on Stat. & Const., 421 and cases there cited.)

The bill of rights of the constitution of 1865, provides that "all property subject to taxation ought to be taxed in proportion to its value."

Section 27 art. 4, prohibits the legislature from exempting from taxation, any property of any named person or corporation.

The new constitution contains the same restrictions, and also provides that the State tax on property exclusive of the tax necessary to pay the bonded debts of the State shall not exceed a certain amount on the hundred dollars valuation.

These are about the only limitations on the taxing power in this State, and section eight of the law of 1875 contains nothing in conflict with these constitutional provisions. It does not make the burden of taxation on the relator any greater, and if any one has grounds of complaint against the law, it is not the company, but such of the towns, cities and counties through which the road runs as receive less, in consequence of this apportionment, than would otherwise fall to their share of the taxes received from the company.

We have no statute in this State regulating the practice on proceedings by *certiorari*, and are to look to the common law for a guide in such cases.

"It is a writ in the nature of a writ of error addressed to an inferior court or tribunal whose procedure is not according to the course of the common law, 117 Mass. 564." A common law writ of *certiorari* only brings up the record and can only reach defects, or errors in the proceedings of the tribunal to which it is issued, which appear upon the face of the record, and which go to the jurisdiction of that tribunal. The evidence is no part of the record, and it is not the office of the writ to bring up the evidence for review. (28 Wis. 271.)

In *certiorari* proceedings the determination of the question involved is to be made upon the return; facts cannot be brought to the attention of the court outside of the return which do not appear therein. (36 Iowa, 15.)

The relator in its petition alleges, that the board, without evidence and against evidence, arbitrarily increased the valuation of its property.

The return denies that allegation, and the journal of the proceedings of the board shows that evidence was heard by the board as to the value of that property, but not what that evidence was.

The board was required by the law to keep a full record of its proceedings and decisions, but not of the evidence adduced. That is no part of the record and proceedings of a court in any case until made so by a bill of exceptions or otherwise provided by law. There is nothing before us but the proceedings of the board made part of respondent's return to the writ. There was

no offer to prove the allegations in the petition, nor, if offered, could this court have heard it. But if the journal showed that the board heard no evidence, that would not invalidate their action.

The State Board of Equalization had full power to assess and equalize property under the act of 1875, sec. 7, p. 121, acts of 1875.

This act was in force when the new constitution was adopted, and when the new board equalized, adjusted and assessed relator's property.

It is, however, contended, that the constitution having provided that the duty of the board shall be to equalize and adjust, its jurisdiction is restricted to equalizing and adjusting, and that any power given to the old board by the law of 1875 to assess, is in conflict with the constitution; that the jurisdiction of this tribunal was not designed to be as fluctuating as the popular will, but to be as fixed and stable as the constitution itself.

There is plausibility and force in the argument, but we are not to presume that the framers of the constitution were ignorant of the law then in force creating the board and prescribing its duties. Before adopting a new system by creating a new board, we may reasonably assume that they informed themselves of the existing law on that subject. The constitution expressly provides that, in addition to equalizing and adjusting it should perform "such other duties as are or may be prescribed by law." We must then look both to the constitution and the law in force at its adoption to ascertain what duties the board had to perform, and as the law of 1875 made the old board assessors, the new board coming in their stead, is also empowered to assess as well as to equalize and adjust. This point was so ruled by Judge Treat in the case above cited.

Every citizen has an appeal from the assessment of his property for taxation, and railroad companies should have the same right. The writ of *certiorari*, we have seen, does not enable them to have the action of the board reviewed upon the evidence; and great injustice might be done them by a board for which

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they would be remediless until the legislature shall have provided for an appeal in their favor; the courts cannot interpose between the board and the companies.

With the concurrence of the other judges, the judgment will be for respondents; Judges Napton and Hough concur, except as to the construction given sec. 18, art. 10 of the new constitution.

ROBERT GILMORE, Plaintiff in Error, vs. JNO. L. DAWSON, Defendant in Error.

1. *Trespas quare clausum fregit*—Amendment of action, on appeal to the circuit court.—Act of 1870—Proceeding, criminal in nature—Suit must be in name of State.—In an action before a justice, brought under the act of 1870 (Adj. Sess. Acts 1870, p. 65), for unlawful entry of "plaintiff's enclosed land, in Pettis county," without more definite description, where appeal is taken to the circuit court, plaintiff may there amend by inserting in his statement a more particular description. The statement contains enough to amend by, and the amendment does not change the cause of action. But the proceeding under that act is criminal in its nature, and if not brought in the name of the State is fatally defective.

Error to Pettis County Circuit Court.

F. A. Sampson, with Crandall & Sinnott, for Plaintiff in Error, cited: *Iba vs. the Hannibal and St. Joseph R. R. Co.*, 45 Mo. 469; *Burt vs. Warne*, 31 Mo. 296; *Coughlin vs. Lyons*, 24 Mo. 533; *House vs. Duncan*, 50 Mo. 453; *Beattie vs. Hill*, 60 Mo. 72.

Heard Bros., for Defendant in Error, cited: *Donohoe vs. Chappell*, 4 Mo. 34; 1 Mo. 545; 31 Mo. 296; 46 Mo. 221.

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding instituted under the provisions of the act of March 23rd, 1870. (Laws of that year, p. 65.)

The complaint was as follows: "Plaintiff states that defendant, on the fifth day of August, 1873, and at various other times, unlawfully entered the enclosed land of the plaintiff, in Pettis

county, Missouri, after being duly notified not to do so, to the damage of the plaintiff five dollars, for which he asks judgment."

The defendant was successful before the justice, and on appeal taken was successful also in the circuit court, as his motion to dismiss the case, because there was no sufficient statement of the cause of action, prevailed.

I.

We regard such dismissal as erroneous, for the reason that the plaintiff, pending the motion, offered to amend by inserting a particular description of the land, and for the further reason that the original statement, although not perhaps sufficiently specific, does state a cause of action, does state sufficient to amend by, and the amendment offered did not change the cause of action.

That consisted in the unlawful entry upon the enclosed land of the plaintiff, after being forbidden so to do. Our statute, with its great liberality of statement and amendment, was certainly never designed to operate more harshly than the common law. In an ordinary declaration for trespass *quare clausum fregit*, nothing was more frequent than for the plaintiff to declare for breaking his close in a certain parish, without naming or otherwise describing his close, and it was this uncertainty which gave origin to the practice of new assignment. (Steph. Plead. pp. 223, 224.)

II.

But notwithstanding the foregoing error we cannot reverse the judgment, because the cause was conducted throughout as a *civil procedure*. The section before mentioned, specifies the act of refusing to depart on due notification by the owner, &c., of the enclosed land, as a *misdemeanor*, punishable on conviction by fine, in the sum of five dollars.

This shows very clearly that the proceedings, contemplated by that section, are of a criminal character, and therefore under the control of that constitutional provision requiring that "all prosecutions shall be conducted in the name of the State of Missouri." And this view is further borne out by that section of the statute which provides that all fines, &c., imposed in any county, shall

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be paid into the treasury thereof, for the benefit of the school fund of that county. (Wagn. Stat., § 15, p. 3501.)

The whole scope and language of the statute under discussion establishes that the legislature, in enacting it, looked alone to criminal prosecutions, and not to civil recoveries, as a means of preventing the trespasses.

Judgment affirmed. Judge Napton absent, the other judges concur.

—o—

BURRELL THOMPSON, Defendant in Error, *vs.* HUGH CRAIG, Plaintiff in Error.

1. *Wills—Devises—What construed to be for life only—Executory agreement for sale of land—Purchase money, payment of, not enforceable, when.*—A will after bequeathing to testator's grandchildren, A. and B., certain described real estate, contained the following provision: "If either of my grandchildren shall die before lawful age, or before leaving a lawful heir or heirs, the above property shall descend to the survivor and his heirs or legal representatives; and if both grandchildren shall die before marriage, or leave no lawful issue by marriage, said estate shall be sold for the benefit of the poor," etc., etc. *Held*, that the will gave only a life estate to A. & B.; that the arrival of A. at a majority and his marriage, and the birth of children to him did not change the character of his estate, and authorize him to convey a fee simple title; and in such case it was held that he could not enforce an agreement (being an executory one) under which the bargainee agreed to pay him a given sum of money "provided that within twelve months" the bargainor should be "competent to give him an unincumbered title to the land."

Error to Saline County Circuit Court.

Draffin & Williams, for Plaintiff in Error.

I. Under the will of Philip W. Thompson, dec'd, the plaintiff did not take the land *in fee*, and could not convey to the defendant a good title to the same. (Harbison *vs.* Swan, 58 Mo. 147; Farrar *vs.* Christy, 24 Mo. 467; Overton *vs.* Davy's Ex'r, 20 Mo. 273.) Wells *vs.* Wells, 10 Mo. 193, properly understood, does not maintain the contrary.

II. The agreement being executory, the defendant will not be compelled to pay the purchase money until the plaintiff is able to make to him a good title to the land. (*Wellman vs. Dismukes*, 42 Mo. 101.)

C. Breathitt and T. J. Werby, for Defendant in Error.

I. Where an estate is given by will upon the happening of two events, whichever happens first vests a fee simple estate in the donee. (Part 1st Redf. Wills, 2nd Ed. pp. 473, 474, § 4, and two last lines of note 6; 1 Jarm. Wills, 4 Ed., p. 427, side pages 444, 445; *Id.* vol. 2, p. 129, side page 175, § 3; *Wells vs. Wells*, 10 Mo. 193, affirmed in *Overton vs. Davy's Ex'r*, 20 Mo. 273.)

II. The intent of the testator must be ascertained by rules of law. (*Austin vs. Watts*, 19 Mo. 298; *Chism's Adm'rs vs. Williams*, 29 Mo. 288.)

HENRY, Judge, delivered the opinion of the court.

This was an action in the Saline circuit court by plaintiff against defendant, on a written agreement, by which defendant bound himself to pay to plaintiff six hundred and twenty-five dollars for that portion of section number twenty-four, township number fifty, range number nineteen, lying east of Pere Flesh Creek, provided plaintiff, within twelve months of the date of said agreement, 6th day of December, 1872, should be competent to give an unincumbered title to said land. Plaintiff alleges in his petition, that at the end of the twelve months he was competent to give the defendant an unincumbered title to said land, and that he made a good and sufficient deed to said land and tendered it to defendant, who refused to receive it.

Defendant's answer admits the execution of the written agreement, but denies that plaintiff was at any time able to make a good title to said land.

There was a trial of said cause in said court, at its October term, 1874, before the court without a jury, and the finding was for plaintiff for the amount claimed with interest.

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In due time defendant filed his motion for a new trial, which was overruled, and he has brought the case here by writ of error. The whole case turns on the construction of the last will and testament of Philip W. Thompson, deceased.

Those portions of the will bearing on the question under consideration are as follows: "I give, grant and devise, and bequeath to my said grandchild, Burrell Thompson, (saving the life interest above granted and devised to my wife Penelope Thompson) all of the lands and improvements which lie," etc., embracing the land in question.

"I give, grant, devise, and bequeath to my granddaughter, Mary Huston, the lands of my estate situate, etc." (describing other lands than those devised to plaintiff.) "It is my will that in the event that either of my grandchildren, above named, shall die before lawful age, or before leaving a lawful heir or heirs, the property above specified, and intended to be given in this will, shall descend to and belong to the survivor of said grandchildren only, and to his or her heirs or legal representatives, and in the event of both said grandchildren, viz: Burrell Thompson and Mary Huston dying before marriage, or in the event of leaving no lawful issue by marriage as aforesaid, it is my will that all my estate, intended in this will for them, shall be sold for the use and benefit of the poor persons of Saline county, Missouri, to be expended and paid as my executor may deem advisable and just."

It was admitted that plaintiff was twenty-one years of age and had a child or children living; and this, the last will of Philip W. Thompson and the written agreement sued on, were the evidence in the case. The defendant asked the court for the following declarations of law:

"That the plaintiff in this cause has only a conditional estate in the land mentioned in the petition, and if plaintiff shall die without leaving lawful issue, then and in that event the estate of the plaintiff in said land would cease, although the court may believe from the evidence that the plaintiff has arrived at the age of majority." This the court refused, and the question for consideration is, whether that declaration of law should have been given, and that will be answered when it is determined what estate in

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the land plaintiff took under the last will of Philip W. Thompson. There are two decisions of this court which, in our judgment, are decisive as to the estate plaintiff holds under the will.

The case of *Harbison vs. Swan*, (58 Mo. 147,) was, in all its material facts, similar to this.

Nathan Van Horn made his last will and testament, and the two clauses of the will upon which the rights of the parties depended, were as follows: "I give and bequeath to my daughter, Harriet, the north half or division of my tract of land, as will appear by a plat of the survey made by Aaron Snider, etc." "Sixth, I give and devise to my daughter, Juliet Van Horn, the south part of the aforementioned survey made by Aaron Snider, and in the event of the death of my daughter Harriet, or my daughter Juliet, without issue, the part devised to the one deceased to descend to the survivor, and in the event of the death of both without issue, then it is my will that the aforesaid parcels of land shall descend to the heirs of my daughter Mary, and the heirs of my daughter Clarissa, to be equally divided among them when they become of age." Judge Napton, who delivered the opinion of the court, held that the will created "a life estate in Harriet and Juliet in the specific land devised to each with cross remainders to the one surviving, and a devise over, in the event of both dying without issue, to the plaintiffs, who were heirs of two other sisters."

In *Farrar vs. Christy's Administrators*, (24 Mo. 453,) the controversy arose on a deed executed by Wm. Christy and wife to their two sons, Howard and Edmund. The deed contained the following words: "To have and to hold the premises aforesaid, with all the appurtenances thereto belonging, to them and their heirs forever, upon condition that should either of the grantees herein named, die without leaving legal heirs of their body, the survivor shall inherit the whole of the property herein conveyed; and should both die without leaving legal heirs as aforesaid, the property hereby conveyed shall revert to the other legal heirs of the said William and Martha T."

The lots referred to in the deed were conveyed by separate metes and bounds, two to Howard and two to Edmund. The

court held that this deed created estates tail in Howard and Edmund Christy, and that, as soon as that was done, those estates became subject to the operation of the fourth section of the act regulating conveyances, approved Feb'y 14, 1825, and converted the estate of each in the lot granted to him, into an estate for life.

In the case at bar there can be no question that the will of Philip Thompson gave to plaintiff only an estate for life in the lands devised to him. His marriage, and the birth of children to him, did not change the character of his estate. He may survive his children, and, in that event, by the express terms of the will, the lands are devised to Mary Huston, and if she be dead without having left children, to the poor of Saline county.

The case of Wells vs. Wells, (10 Mo. 193,) is not at all analogous to the case under consideration. That was the case of a devise to certain legatees, with a condition, that if either of such legatees should die before coming of age or marriage, the portion of such legatee should be equally divided among the others."

One of the legatees married, and afterwards died under age, and the question was whether her portion was to be divided among the other legatees.

The court held that "there were two events, either of which would free the estates of the children by the last marriage from any contingency, namely, the dying under age, or marrying."

* * * The clear implication from the will is, that by attaining a majority, or marrying, the estate of a child was freed from any limitation and became absolute." Per Scott J. Overton and wife vs. Davy's Ex'r, (20 Mo. 278) is similar to Wells vs. Wells, and was decided upon the same principle; but has no application whatever to the question involved in the case at bar. It is not necessary to inquire what estate each of the devisees took under the will of Philip Thompson in the land specifically devised to the other.

Burrell Thompson sold a part of the land expressly devised to him, and not the land devised to Mary Huston. As he had but a life estate in the land sold by him to defendant, he could not make him such a title as his agreement with defendant called for,

and as it was an executory agreement, defendant will not be compelled to pay the purchase money until plaintiff is able to comply with the stipulations on his part. (Wellman's adm'r vs. Dismukes, 42 Mo. 101.)

With the concurrence of the other judges, the judgment of the circuit court is reversed and the suit dismissed.

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THE STATE OF MISSOURI, Defendant in Error, vs. WILLIAM PINTS,
Plaintiff in Error.

1. *Practice, Supreme Court—Bill of exceptions—Exceptions to actions of court, etc. not incorporated in—Record proper only, will be reviewed.*—On trial of an indictment where no exceptions to the admission or rejection of evidence, or the giving or refusing of instructions, or the action of the court in overruling motions are preserved in the bill of exceptions, the Supreme Court can review nothing but the record proper, i. e., the indictment, and the subsequent pleading including verdict and judgment.

Error to Bollinger County Circuit Court.

J. C. Noell, for Appellant.

J. S. Smith, Atty Gen'l, for Respondent, cited: Hoyt vs. Williams, 41 Mo. 270; Bateson vs. Clark, 37 Mo. 31; State vs. Matson, 38 Mo. 489.

NORTON, Judge, delivered the opinion of the court.

The defendant was indicted in the circuit court within and for Bollinger County in December, 1875, for murder in the first degree, for killing one Catharine Burr on the 6th of November, 1875. Defendant at the same term of court was duly arraigned and on his plea of "not guilty" was put upon his trial, which resulted in a verdict of guilty of murder in the first degree as charged in the indictment. The case is brought here for review upon writ of error. The evidence in this case is not preserved in a bill of exceptions. No exceptions to the admission or rejection of evidence nor to the giving or refusing instructions, nor to the action of the court in overruling motions, were preserved, and all that we can consider in reviewing the case is the record

proper. (St. Louis vs. Milligan, 18 Mo. 181; Hoyt vs. Williams, 41 Mo. 270.)

In the case of Bateson vs. Clark, (37 Mo. 31) it was decided by this court that "the record proper is by law the petition, summons and all subsequent pleadings, including the verdict and judgment; and these the law has made it our duty to examine, and if any error is apparent on the face of these pleadings constituting the record, we will reverse the cause whether any exceptions were taken or not.

"Exception is matter which arises wholly from the action of the court in the progress of the trial, such as the admission or rejection of evidence, the sustaining or overruling of some motion, the giving or refusing of instructions, etc. This is strictly no part of the record unless made so by being incorporated in a bill of exceptions, and to entitle it to any notice, or to be made available here, the action of the court must have been excepted to at the time the alleged error was committed."

Under the above rule our examination of this case is necessarily restricted to the indictment and subsequent pleadings, including verdict and judgment.

The crime of murder in the first degree is well charged in the indictment, and every fact necessary, to constitute this the highest crime known to the law, is stated therein, and it is sufficient, in all respects, to support the judgment which was rendered on the verdict. The record affirmatively shows the arraignment of the prisoner and his presence during the trial, and at the rendition of the verdict. If the case is as stated in the brief of counsel, much more diligence should have been used, than was used, to protect the interests of the defendant. The methods known to the law for bringing the matters referred to in the brief to the attention of this court, so that they could have been considered, should have been employed. A departure from these methods, which are sanctioned by the highest authority, cannot be allowed even in a case as important as the case at bar is, and there is nothing left for us to do but affirm the judgment of the court below.

Judgment affirmed. The other judges concur.

State v. Lane.

STATE OF MISSOURI, Respondent, *vs.* JEPHTHA LANE, Appellant.

1. *Murder in first and second degrees—Facts necessary to constitute—Deliberation, premeditation and malice—Proof and presumptions as to.*—Under our statute he who uses a deadly weapon with fatal effect and with a manifest deadly purpose having sufficient time—be it long or short—to deliberate and fully form the purpose of killing, and without sufficient reasonable cause to apprehend immediate personal violence, or other sufficient cause or extenuation, is guilty of murder in the first degree. To that end deliberation, premeditation and malice, are not to be presumed but must be proved. The proof, however, need not be direct but may be shown by circumstantial evidence such as the above, and deduced by the jury from all the facts in the case.
- In murder in the second degree, deliberation and premeditation need not be shown, but only malice. And from the simple act of killing, the law will presume malice.
2. *Practice, criminal—Homicide—Different grades—For what defendant may be tried under indictment—Question of grade when for jury—Instructions—Should be confined how—What will warrant reversal.*—Under an indictment for murder in the first degree defendant may be convicted of either murder in the first or in the second degree, or in any of the degrees of manslaughter of which the evidence may show him to be guilty. And where from the evidence the question of the grade is doubtful, the court may properly leave it to the jury to determine, under instructions defining the different grades to which the proof may apply.
- In such indictment if the evidence shows murder in the first degree and no other the court may confine its instructions to that grade and refuse to instruct as to any other. And an instruction as to other grades, in the absence of evidence applying thereto, will warrant a reversal.
3. *Instructions—Refusal of not error, when.*—The refusal of instructions substantially incorporated in those given is not error.

Appeal from Bates County Circuit Court.

C. C. Bassett, for Appellant, cited: *State vs. Paillips*, 24 Mo. 475; *State vs. Starr*, 38 Mo. 270; *State vs. Harris*, 59 Mo. 550.

J. L. Smith, Atty Gen'l, for Respondent, cited: *State vs. Schoenwald*, 31 Mo. 157; *State vs. Philips*, 24 Mo. 486; *State vs. Sloan*, 47 Mo. 615; *State vs. Underwood*, 57 Mo. 49; *State vs. Starr*, 38 Mo. 270; *State vs. Holme*, 54 Mo. 53; *State vs. Joeckel*, 44 Mo. 236; *State vs. Stockton*, 61 Mo. 383; *State vs. Harris*, 59 Mo. 550; *State vs. O'Connor*, 31 Mo. 389.

NORTON, Judge, delivered the opinion of the court.

The defendant was indicted in the circuit court of Bates county at its July term, 1876, for murder in the first degree, in killing one John W. Morton.

He was tried at the November term of said court and convicted of murder in the second degree and his punishment assessed at ten years imprisonment in the penitentiary.

Exceptions were duly taken to the action of the court in overruling a motion for a new trial, and an appeal was prayed for and allowed to this court.

The only point presented for our consideration is as to the action of the trial court in giving and refusing instructions ; and as those given by the court relating to murder in the first and second degrees are especially complained of we copy them herein. They are as follows,

1. " Murder in the first degree as charged in this indictment consists in wilful, deliberate and premeditated killing with malice aforethought. Malice to constitute murder in the first degree consists in the actual and deliberate intention unlawfully to take the life of another.

There must be an actual intention to kill, and if such intention exists it is wilful. If such intention is accompanied by such circumstances as evidence a mind fully conscious of its own purpose and designs it is deliberate, and if sufficient time is afforded to enable the mind fully to frame the design, select the instrument by which death is accomplished or to frame the place to carry this design into execution, it is premeditated.

He who uses a deadly weapon by which death is produced with a manifest design so to use it, with sufficient time to deliberate and fully to form a conscious purpose of killing, and without reasonable cause to apprehend immediate personal violence to himself, is guilty of murder in the first degree. And if the jury are satisfied and find from the evidence that the said John W. Morton was in said Bates county, shot and killed, and that defendant wilfully, deliberately, premeditatedly and with malice aforethought, as these terms are before defined, committed said

acts of shooting and killing, then he is guilty of murder in the first degree. The law fixes on no length of time to form this intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury from all the facts and circumstances in evidence.

If the defendant had time to think and did intend to kill for a moment as well as for an hour or day, then the killing is a wilful, deliberate and premeditated killing, and when the act is committed wilfully and deliberately, with the means and instruments calculated to produce death, then the malice requisite to murder will be presumed, unless defendant had reasonable cause to apprehend a design on the part of the deceased to do him some great personal injury, and there was reasonable cause to apprehend immediate danger of such design being accomplished without the fault of defendant.

2. "Murder is in either the first or second degree. To constitute murder in the first degree, the act which produced the death must be wilful, deliberate, and premeditated, and to constitute murder in either degree the act which produced the death must have been done in malice. Where the circumstances of deliberation and malice are not proved, the law will only presume the killing to be murder in the second degree."

It is said by counsel for the defendant that the above instructions do not distinguish correctly between murder in the first and second degrees; and that if the distinction was properly stated the evidence in the case shows the crime to have been either murder in the first degree or justifiable homicide, and that for these reasons the second instruction ought not to have been given.

The instructions complained of very clearly and specifically, and in terms which could not be misunderstood by the jury, point out the difference between these two offences, and in giving them the trial court followed the views of this court as expressed in the following cases. (State vs. Dunn, 18 Mo. 419; State vs. Starr, 38 Mo. 270; State vs. Underwood, 57 Mo. 49; State vs. Hudson, 59 Mo. 135; State vs. Foster, 61 Mo. 549; State vs. Holme, 54 Mo. 153.) In the latter case Judge Wagner re-

marks, that "from the simple act of killing, the law will presume that it was murder in the second degree only. To raise it to a higher grade of murder in the first degree, there must be some circumstances shown from which the jury can find that it was done with wilfulness and premeditation." * * * "The language of the court has uniformly been that under our statute, unless the circumstances of malice are proved, the law will presume the unlawful killing murder of the second degree." * * "Whenever it appears from the whole evidence that the crime was at the moment deliberately and intentionally done it is murder in the first degree." In Foster's case *supra* it is said that in the case of Underwood *supra* an instruction that if the killing was done by the shooting the law presumed that it was intentional and that it would be murder in the second degree, was by the court approved and was in consonance with all the cases construing the statute.

Judge Wagner speaking for the court in the Foster case observes that "our statute makes wilful, deliberate and premeditated killing murder in the first degree. 'Wilful' simply means 'intentional.' Therefore, when an intention to kill exists it is wilful. Whilst intention is of the essence of the offence something more is required. It must be accompanied by such circumstances as will warrant the jury in finding that there was deliberation and premeditation. These circumstances need not be expressly proved, but facts must be shown from which their existence may be inferred."

The elements which enter into the offence constitute the distinguishing features between murder of the first and second degree. To make murder in the first degree, the elements of deliberation and premeditation must be found to exist, whereas in murder in the second degree there need be no deliberation or premeditation but only malice.

Viewing the instructions given in this case, and to which our attention has been specially called, in the light of the authorities above quoted, we think the law was correctly declared by them and the court fully warranted in giving them.

It is insisted by counsel that the instruction in regard to murder in the second degree should not have been given, because the evidence established either a case of murder in the first degree or justifiable or excusable homicide.

It has been held by this court that in trials for murder in the first degree deliberation and premeditation are never presumed, that they must be shown in order to make out the offense—they are a part of its constituent elements. They may be deduced from all the facts attending the killing, and if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding that the offense of murder in the first degree was committed.

It is for the jury to draw their conclusions and make their findings from all the facts in evidence. (State vs. Foster, 61 Mo. 549.)

Inasmuch, therefore, as the existence of deliberation and premeditation are facts to be proved to the satisfaction of the jury, either by the direct or circumstantial evidence, we do not perceive that error was committed by the court in instructing the jury, that if these facts did not appear in evidence or were not proved the law would presume the killing to be murder in the second degree.

While the evidence in the case strongly tended to show a case of wilful, deliberate, and premeditated killing on the part of defendant, there are circumstances developed in the history of the case as the evidence discloses it from which the jury might well have reached the conclusion they arrived at.

The evidence tends to show that on the day of the killing, angry and threatening words passed between defendant and deceased, that deceased had threatened to kill defendant; that about the time of the shooting, which took place on the night of July 15, 1876, between eight and nine o'clock, deceased was sitting on the tongue of a reaping machine at the edge of a side walk in the town of Butler—and was cursing and abusing defendant who it appeared was acting as deputy marshal of the town; that a number of persons were present; that while Morton the

deceased was thus abusing defendant he passed along the side walk and beyond the deceased.

Several witnesses testified that as defendant passed deceased, the deceased said that defendant had starved his wife and child, that defendant soon after fired his pistol in the direction of deceased, that deceased sprang from his seat towards defendant and that several shots were fired between the parties, defendant discharging his pistol four or five times, and deceased firing one or more shots. During the affray deceased received the wounds of which he died. From the evidence in the case the court might well, as it did, instruct the jury as to the facts constituting murder both in the first and second degrees, and refer to them, as it did, the finding of the facts necessary to be proved by them before defendant could be convicted in either degree. Under an indictment for murder in the first degree the defendant may be convicted of either murder in the second degree or of any of the degrees of manslaughter of which the evidence may show him to be guilty, and it is entirely within the province of the court to instruct the jury as to what facts are necessary to constitute murder in either of its degrees, or any of the degrees of manslaughter to which the facts of the case in evidence might apply. If the evidence makes out a case of murder in the first degree and applies to that kind of killing and no other the court would commit no error in confining its instructions to that offense, and refusing to instruct either as to murder in the second degree or manslaughter in any of its various degrees. And when an instruction is given for any less grade of offense, and there is no evidence upon which to base it, this court would be justified in reversing the judgment for such an error. In the case we are considering there was evidence of unlawful killing, by shooting with a pistol, done under such circumstances as not to constitute manslaughter in any of its degrees, and we think that the instruction relating to murder in the second degree was not improperly given, as the evidence might be applied either to murder in the first or second degree.

The instructions given by the court in the place of those refused on the part of defendant gave to defendant the full benefit

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of the law of self defence as repeatedly declared by this court and it is wholly unnecessary to review them in detail.

It appears to us from the whole record in this case that the verdict of the jury is sustained by the evidence and the judgment entered thereon will not be disturbed.

Judgment affirmed the other judges concurring.

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W. H. HASSETT, *et al.*, Respondents, *vs.* J. D. RUST, *et al.*,
Appellants.

1. *Mechanic's lien—Notice—Account not sworn to, effect of.*—Where notice of a mechanic's lien, served on defendants, states the amount of the account, and describes the property to be charged, and the account is attached and specifies the materials, and when furnished, and the notice and account are filed with the clerk of the circuit court, the law is sufficiently complied with, although the account is not sworn to.
2. *Mechanic's lien—Joint original contractors—Joinder of in suit.*—In suit by a sub-contractor on a mechanic's lien, where there are two original joint contractors, it is not necessary that plaintiffs should join both as defendants.
3. *Mechanic's lien, suit on—Service, how may be made.*—Service of notice of suit in the circuit court on a mechanic's lien, made by a constable, is sufficient; and, *semble*, that such service may be made by any competent witness or any officer authorized to serve writs.
4. *Instructions, pleadings, etc.*—Instructions should not be given on issues not made by the pleadings.
5. *Mechanic's lien suit—Failure of petition to state when work was done, etc.—Dates set forth in account attached—Const. Stat.*—Under the present statute (Wagn. Stat. 1020, § 38), where, in suit on a mechanic's lien, plaintiff files, attached to his petition, an itemized account showing when the work was done or the material was furnished, which account is referred to in the petition as a part of it, the silence of the petition on these points is not a fatal defect.
6. *Mechanic's lien—General judgment against owner.*—In a mechanic's lien suit a general judgment against the owner is a fatal defect.

Appeal from Howard County Circuit Court.

Geo. H. Shields, for Appellants, cited: Williams vs. Powers, 51 Mo. 441; Wagn. Stat. 910, § 9; 909, §§ 5, 8; Kerr vs. Mut. Ins. Co., 40 Mo. 19; Bowling vs. McFarland, 38 Mo. 365; Baker vs. Berry, 37 Mo. 306; Id. 603; Chambers vs. Carthel,

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25 Mo. 374; and contended that under Wagn. Stat. 1020, § 38, the mere items of the account were all that were intended to be set forth when it permitted it to be filed.

Martin & Porter, for Respondents.

HENRY, Judge, delivered the opinion of the court.

Plaintiffs commenced their action in the circuit court of Randolph county against appellant and D. F. Kimmel, to enforce a mechanic's lien against the property described in the petition, alleging that Kimmel was an original contractor, employed by his co-defendants to build for them a dwelling house on the lots in question, and that the lumber and nails specified in the account were sold to Kimmel and used by him in the construction of said dwelling house; that on the 15th day of March, 1874, plaintiff filed with the clerk of the Randolph circuit court a just and true account of their claim, after all just credits had been given, with a true description of the property, etc.; that on the 25th of February, 1874, they gave Rust and Wonderly notice in writing of their intention to file a lien on said dwelling house, unless said debt were paid within ten days thereafter.

At the May term, 1874, of said court, on defendant's application, a change of venue was awarded to Howard county, and at the August term, 1874, of the Howard circuit court, Rust and Wonderly filed their answer, which denied the indebtedness of Kimmel to plaintiffs; denied that Kimmel was an original contractor with defendants to build the dwelling house; that the lumber and nails were used in the construction of said dwelling house; that plaintiffs gave them a written notice of their intention to file a lien, etc., and that on the 18th of March, 1874, plaintiffs filed with the clerk of the Randolph circuit court a just and true account, etc.

At the December term of said court, 1874, there was a trial of the cause, which resulted in a verdict for plaintiffs for one hundred and three dollars and sixty cents, and after motions for new trial and in arrest were overruled and judgment entered for

plaintiffs, defendants Rust and Wonderly appealed from said judgment to this court.

Appellants insist upon the following points for reversal of the judgment: 1st, that the account filed with the clerk of the Randolph circuit court, in order to establish his lien, was not sworn to, and that the property sought to be charged with the lien was not described in the statement filed; 2d, that there were two original contractors, and but one of them was sued; 3d, that notice of intention to file the lien was not served by one authorized to serve it; 4th, that the court refused instructions to the jury declaring that the burden of proof of partnership of plaintiffs, and of ownership of the property by defendant, was on plaintiffs; 5th, that there is no averment in the petition where the items of the account sued on were furnished. We will notice these points in their order.

The notice served on defendant states the amount of the account, and the account is also attached to the notice, and specifies the materials and when furnished. To the notice plaintiffs made affidavit, and that notice also contains a description of the property to be charged with the lien. That notice, so sworn to, and a copy of the account attached, were filed with the clerk, and we think that this was a substantial compliance with the law.

In 55 Mo. 116, it was held, that in a suit against the owner, to enforce a mechanic's lien, it was not necessary to make both of the contractors parties to the suit. Judge Adams said: "The law requires the original contractor to be made a defendant. But where there are several joined in the contract one may be sued alone, and so one may be brought before the court in a suit on the lien. If the owners of the property desire the other joint contractors to be made defendants, the court may, in its discretion, have them brought in as defendants, if they are within its jurisdiction."

This disposes of the second point. With regard to the service of the notice required by § 19 (Wagn. Stat. 911), the law does not provide how it shall be served, but we presume it might be served by any one who would be a competent witness, making

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affidavit to the service, or by any officer authorized to serve writs or other process of a court. The notice was served by a constable, and we think that this was a sufficient service.

The fourth complaint is, that the court refused instructions to the jury, declaring that the burden of proof was on plaintiffs to show their partnership, and that defendants owned the property described in the petition. There was no allegation in the petition that plaintiffs were partners, nor is it denied by the answer that defendants owned the property which plaintiffs sought to charge with the lien, and the court could not, with any propriety, have given instructions on issues not made by the pleadings. Besides, there was abundant evidence that plaintiffs sold the lumber and nails to Kimmel, and none to the contrary, and the only question on the evidence was, whether he sold them on his account or on account of defendants. There was proof that defendants owned the property, the only proof required, that they had contracted for the building of the dwelling house on the lots, and no evidence was introduced conducing to show that they were not owners. No view that can be taken of either the issues or the evidence would have justified the court in giving the refused instructions. There was no averment in the petition when the materials were furnished, and up to the adoption of § 38, (Wagn. Stat. 1020) this would have been a fatal defect.

In *Heltzell vs. Langford* (33 Mo. 397) the court held that "one of the requisite facts is, that the creditor shall, *within a time limited*, file an account of his demand. The time of filing is a material, issuable fact which must be alleged, and without which the petition will not show a cause of action."

The time of filing could only be an issuable fact with a view to ascertaining whether the account was filed with the clerk of the proper court, within the time prescribed by the fifth section, and unless it was also stated when the indebtedness accrued, the issue made on the time of filing would be wholly immaterial. It was as necessary to state when the indebtedness accrued as when the account was filed, for that it accrued within six months preceding the filing of the papers for securing a lien, was one of "the facts necessary for securing a lien."

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Heltzell vs. Langford was decided before the adoption of § 38, (Wagn. Stat. 1026), which provides that "it shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but if they be not set forth he shall attach to his pleading, referring to it therein, a copy of the account, which shall be a part of the record, but if they be not set forth in, or attached to, said pleading, he shall be precluded from giving evidence thereof."

In Jones vs. Shaw, (53 Mo. 68) the reason assigned in the motion in arrest was, that it was not stated in the petition when the materials were furnished, and Wagner, J. delivering the opinion of the court, said: "Accompanying the petition was an exhibit giving the dates and the items; and there is an express averment in the petition, that the plaintiffs did on a certain day, and within six months after furnishing the materials, file in the office of the clerk of the circuit court their affidavit and statement and bill of particulars, for the purpose of enforcing their lien. This was surely sufficient after verdict." No reference was made in the opinion to the 38th section, and as the petition in the case at bar does not contain an averment that plaintiffs, within six months after furnishing the materials, filed in the office of the clerk their affidavit and statement, it is fatally defective, unless the 38th section makes the account filed with, and referred to in the petition, a part of the petition.

It seems to be the meaning of that section, that attaching the account to the pleading and referring to it in the pleading, would have the same effect as setting forth the items of the account in the petition, and that it then becomes a part of the record; that is, a part of the petition, and if the account state when the items were furnished, it is a substantial averment to that effect. The court, therefore, did not err in overruling the motion in arrest of judgment.

In examining the record in this case we have discovered a fatal error. The judgment against Rust and Wonderly is a general judgment, and such a judgment as the court was not authorized to render against them. They were sued as owners of the property, and not as debtors of the plaintiffs, and were not personally

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liable to plaintiffs for any portion of the debt. (Stewart vs. Garvin, 33 Mo. 103 ; Schmeidler vs. Ewing, 57 Mo. 79.)

There should have been a general judgment against Kimmel and a special judgment against the property, as provided in the 14th and 15th sections. (Wagn. Stat. 910, 911.)

The judgment is reversed, with directions to the court below to enter a judgment in conformity with this opinion. The other judges concur.



JOHN W. SMITH, *et al.*, Respondents, vs. THE CHARTER OAK LIFE INSURANCE Co., Appellant.

1. *Life Insurance—Refusal to pay annual premium—Action against company for breach of contract—Intercourse of States, prohibition of, by proclamation of August 16th, 1861—Damages, measure of, how determined—Married women—Statute of limitation.*—Where the life of a citizen of Virginia was insured in a Connecticut company, and, after receiving the annual premium for a number of years, in May, 1861, the company refused to take a further payment thereof, it was held, that, upon the death of the assured, an action would lie on behalf of the beneficiary against the company, for dissolving its contract by such refusal; that non-intercourse between the States could not be pleaded as justifying the non-payment, inasmuch as the prohibition of such intercourse did not date till August 16th, 1861, when President Lincoln issued his proclamation, pursuant to the Act of Congress of July 13th; and that the measure of damages would be the value of the policy at the date of its dissolution—which value might be determined by the opinion of actuaries—with interest on the amount at six per cent.

In such case, where the agent of the company and the beneficiary resided within the limits covered by the proclamation when the cause of action accrued, the period of the war would not curtail the running of the statute.

But if the beneficiary were a married woman when it accrued, the statute would not run during her coverture.

Appeal from St. Louis Circuit Court.

Samuel Knox, for Appellant.

I. In May, 1861, when the annual premium became due, war existed between the United States and the State of Virginia; the existence of war revoked the power of defendant's agent at Lynchburg, and it would have been unlawful for defendant to

transact business with plaintiff during the existence of the war. (19 Grat. 393 ; 5 Wall. 407 ; Tait vs. New York Life Insurance Co. and cases there cited.) That the contract of insurance was canceled by the war, see DeJarnette vs. DeGiverville, 56 Mo. 440 ; Washington University vs. French, 18 Wal. 106. As to the time of commencement of hostilities, April 29, 1861, see 12 Wall. 700 ; 44 Geo. 119.

II. The payment of the annual premium when due was a condition precedent. A failure so to pay caused a forfeiture of the policy. (25 Conn. 530 ; Moakley vs. Riggs, 2 Wall. 1 ; 12 N. Y. 99 ; Tomkins vs. Dudley, 19 Peck, 275 ; Adams vs. Nichols, 11 N. Y. 25 ; Oakey vs. Martin, 6 Cow. 624 ; Union Mut. Life Ins. Co. vs. McMillen, 24 Ohio, 67-81 ; 1 Cent. Law Jour. 433.)

III. The return of the money on March 14th, 1862, without objection on the part of plaintiff, annulled the policy. (9 Blatch. 239 ; 59 Barb. 556 ; Sands vs. N. Y. Life Ins. Co. Morey vs. N. Y. Life Ins. Co., U. S. Circuit Court for Southern District of Miss., Cent. Law Journ. 139 ; 20 Gratt. 639 ; and by receiving the money defendant consented to the cancellation. Bliss' Life Ins. pp. 661, 682.)

IV. Even if the cause of action did not accrue until April, 1865, or the close of the war, more than six years elapsed before the institution of this suit, whereas, in fact, by the lapse of five years plaintiff's claim was barred.

V. When Jellis had the money for the premium paid in May, 1861, and before its return in March, 1862, to-wit: in the month of November, 1861, John Woodson Smith voluntarily entered into the military service of the Confederate States, and remained until the year 1863. This act itself rendered the policy void. (Dillard vs. Manhattan Life Ins. Co., 44 Geo. 119.)

VI. The court erred in prescribing the measure of damages. No cause of action existed until the war was over and a demand was made by plaintiff on the company. No interest could run until said demand.

Sharman & Cameron, for Respondents, cited : Centr. Law Journ. Vol. 1, No. 7, p. 76 ; Cappell vs. Hall, 7 Wall. 554 ;

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The Venice, 2 Wall. 277; The Reform, 3 Wall. 617; The Sea Lion, 5 Wall. 646; The Ouachita Cotton, 6 Wall. 530; McKee vs. United States, 8 Wall. 166; U. S. vs. Anderson, 9 Wall. 56; U. S. vs. Grossmeyer, 9 Wall. 74; Dean vs. Nelson, 10 Wall. 160; Matthews vs. McGhee, Centr. Law Journ. No. 50; 11 Allen [Mass.], 224; Keton vs. Keton, 20 Mo. 543; Hanger vs. Abbott, 6 Wall. 532; 3 Pars. Con. 105; 3 Bing. 353; 3 Wend. 356; Hull vs. Caldwell, 6 J. J. Marsh. 208; 8 Pick. 90; 2 Speers, 594.

NAPTON, Judge, delivered the opinion of the court.

This action was commenced on the 7th of June, 1871, against the insurance company for damages occasioned by an alleged breach of a contract of life insurance made by the defendant in 1853, on the life of John Woodson Smith for the benefit of his wife, the present plaintiff.

The premiums were due annually on the 6th of May each year, and had been punctually paid until the 6th of May, 1861, when the premium due was tendered and conditionally received by the defendant's agent in Lynchburg, but subsequently returned on account of instructions from his principal at Hartford. This is claimed in the petition to have been a breach of the contract on the part of the defendant, and damages are therefore claimed for this breach.

The answer sets up this failure to pay on the 6th May, 1861, and every year thereafter, as a defense to the action, and alleges as a further cause of forfeiture, that Smith entered the military service of Virginia in 1861, and as an additional defense, that he had become intemperate. All these are specified in the policy as grounds of forfeiture. The answer also set up the bar of ten years' limitation since the action accrued.

The case was submitted to the jury under instructions which authorized a verdict for the plaintiff, if the evidence satisfied them that the defendant refused to receive or receipt for the premium tendered on the 6th May, 1861; provided John Woodson Smith had not before that day entered the military service of Virginia, and had not become intemperate in his habits; and

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the court declared that non-intercourse had not been authoritatively announced between Virginia and the government at Washington, until the 10th of August, 1861, when President Lincoln issued his proclamation in pursuance of the act of congress of July 13th.

Under these instructions the plaintiff obtained a verdict for \$914, and a judgment at special term was entered accordingly. The general term, on a review of the case, affirmed this judgment, all the judges concurring in the opinion delivered by Judge Krum.

The case comes to this court by appeal.

The defenses based on the charge of intemperance and joining the Confederate army, having been submitted to the jury, no question arises on them or either of them.

The date of the prohibition of intercourse between citizens of Virginia and Connecticut was correctly stated in the instructions given by the judge presiding at the trial, as has been repeatedly established by decisions of the Supreme Court of the United States.

It will be seen that the object of the petition in this case is not to enforce the contract of insurance, but to claim damages for its dissolution by the company without justifiable cause; and the damages claimed and awarded were the value of this policy at the date of its dissolution by the company's agent. The opinions of actuaries in regard to the value of this policy were submitted to the jury, and the verdict was based on that evidence, giving the plaintiff interest on the estimated value at the rate of six per cent.

In the case of *New York Life Insurance Company vs. Stathan and others*, decided in the Supreme Court of the United States at the October term of the present year, and printed in the *Central Law Journal* (vol. 3, p. 723), the court held that such damages were recoverable. Four judges dissented, but two of them on the ground that the civil war of 1861 merely suspended the contract, and therefore that the plaintiffs in the case decided were entitled to recover the entire sum secured in the policies, the party or parties being dead whose lives were insured. The same

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opinion, substantially, had been previously expressed by the five judges of the circuit court in St. Louis, through Judge Krum, affirming the judgment of Judge Lindley.

These opinions of Mr. Justice Bradley of the Supreme Court of the United States, and of Judge Krum of the Circuit Court of St. Louis, contain a review of all the cases on the subject, and we think it unnecessary to repeat them, concurring as we do in their views. (Cent. Law Journ., vol. 1, No. 7.)

The statute of limitations pleaded in this case was no bar, because the plaintiff was a married woman when the right of action accrued. Although her husband might have sued when the cause accrued in 1861, her right to sue within the time limited by the act in regard to coverture is not affected. An infant may sue by his guardian, or a married woman by her husband, but they are entitled to the privilege of disability. (Keeton vs. Keeton, 20 Mo. 543, and cases there cited.)

The intervention of the war cuts no figure in this case, because both parties lived in Virginia when the cause of action accrued (Manhattan Life Ins. Co. vs. Warwick, 20 Grat. 614), and therefore the four years of war could not be deducted from the ten years in which the suit was allowed.

The judgment is affirmed. The other judges concur.

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ENOCH BRADSHAW, *et al.*, Plaintiffs in Error, *vs.* WILLIAM BRADBURY, Defendant in Error.

1. *Ambiguity, patent—Explanation of.*—Patent ambiguity cannot be explained by extrinsic evidence.
2. *Deeds, construction of—Words not technical, how to be taken.*—In ascertaining the intent of the maker of a deed, where the words employed are not technical, they must be taken in their usual acceptance.
3. *Deeds—Description in by words and figures—Which shall govern.*—In deeds as well as notes, where words and figures are used to describe the same thing, and are contradictory, the description by words will govern. Thus, where a deed conveyed "lot number (142) one hundred twenty-four (124)," the lot conveyed was held to be 124, and not 142.

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*Error to Cole County Circuit Court**E. L. Edwards & Son*, for Plaintiffs in Error.

J. L. Smith, Att'y Gen'l, for Defendant in Error, cited: *Jennings vs. Brizadin*, 44 Mo. 332; *Newsom vs. Prior*, 7 Wheat. 10; *Henry vs. Thompson*, 6 Cow. 178; *Seaman vs. Hogeboom*, 21 Barb. 398.

HENRY, Judge, delivered the opinion of the court.

This was an action of ejectment, instituted in the circuit court of Cole county by plaintiffs, who are husband and wife, against defendant, to recover a lot of land in Jefferson City, described on the plat of said city as "lot No. 142." The petition is in the ordinary form, and the answer a general denial:

At an adjourned term of said court, held in November, 1874, there was a trial of said cause by the court without the intervention of a jury. Both parties claim under the State of Missouri.

Plaintiffs claim through James Logan, to whom George W. Miller, then Commissioner of the Permanent Seat of Government, on the 6th day of December, 1837, executed a deed, the effect of which will be considered hereafter. Cynthia Bradshaw was the widow of James Logan, and after his death intermarried with Enoch Bradshaw.

By his last will and testament James Logan devised to Cynthia, during her life, all of his real estate, and if he had any title to the lot in question it passed to Cynthia, under his last will, for her life. The plaintiffs introduced in evidence the deed from George W. Miller, Commissioner as aforesaid, to James Logan, which conveyed to said Logan (we quote the exact language of the deed) "the following described lot or parcel of ground, known and described on the plat of said city of Jefferson as lot number (142) one hundred twenty-four (124), for the sum of forty-two dollars."

There is nothing else in the deed indicating which lot the commissioner intended to convey, and the question is, which lot did the deed convey? If it conveyed lot No. 124, the judgment of the circuit court was for the right party, and it is unne-

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cessary to consider the other questions arising on instructions or the admission or exclusion of evidence.

No resort can be had to parol evidence to show which lot was intended by the description. If there is any ambiguity, it is patent. The rule that a deed is to be construed most strongly against the grantor would give the grantee one of the lots, but it would give him, not the one of his choice, but that one which, upon established rules of construction, it was the probable intention to convey. "When more than one description is given, and there is a discrepancy, that description will be adhered to as to which there is the least likelihood that a mistake could be committed, and that be rejected in regard to which mistakes are most apt to be made. (2 Washb. Real Prop. 631.)

"There is another principle applicable to the case. Here is a flat contradiction in the description, and then we ought to take that which is most stable and certain." (Spencer, J., Jackson vs. Loomis, 18 Johns. 86.)

In Story on Prom. Notes (§ 21), Judge Story, in regard to promissory notes, says: "Where the sum in figures on the superscription differs from the sum in words in the body of the instrument, the latter is by law deemed the true sum."

Marius gives as a reason for such a decision, which seems founded in common sense and experience, that a man is more apt to commit an error with his pen in writing a figure than he is in writing a word. Whether the same rule would apply if the sums were in figures in the body of the instrument, and in words in a memorandum or marginal note on the same, does not appear to have been decided, but it should seem that the words ought to be deemed the better and more solemn statement, and therefore ought to govern."

The reason given by Marius for the rule as applicable to promissory notes equally applies to deeds. Rules of construction are adopted with a view to ascertain the intention of the parties, and are founded in experience and reason, and not arbitrarily adopted. They are not intended to make terms for contracting parties, but simply to ascertain what the language means which they have employed in their contracts. There are

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words in deeds as in notes and other instruments which have a technical meaning, and are construed accordingly, but language in deeds or notes, or other instruments, not technical, must be taken in its ordinary and usual sense. There is no reason why a rule which will discover the meaning of language not technical, in a note or other instrument, may not be resorted to to ascertain the meaning of language not technical in a deed.

The language of the deed from the commissioner to James Logan, describing the premises conveyed, is not technical, and, applying the rule we have quoted, it is very clear that lot No. 124, and not lot No. 142, was conveyed by the deed, and as plaintiffs sued for lot No. 142, and have shown no title to it, the judgment of the circuit court should be, and with the concurrence of the other judges is, affirmed.

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JOHN MORAN, Plaintiff in Error, *vs.* JOHN PLANKINTON, *et al.*,
Defendants in Error.

1. *Actions—Multiplicity of suits—Knowledge of remedy, etc.*—Where, of certain stock stolen and purchased by a third party, the owner replevied a portion and afterward brought trover for the remainder, and it appeared that at the time of the first suit he had knowledge of the conversion of a portion of the stock claimed in the second, *held*, that for that portion his second action would not lie, but *contravise* as to that touching the conversion of which he was ignorant. The rule prohibiting multiplicity of suits, has no reference to a case where the party has no knowledge of his means of redress.

Appeal from Jackson County Circuit Court.

H. B. Johnson, with Tichenor & Warner, for Plaintiff in Error.

Wallace Pratt & Frank B. Huff, for Defendants in Error, cited: *Wagner vs. Jacoby*, 26 Mo. 532; *Flaherty, Adm'r, vs. Taylor*, 35 Mo. 447; 15 Johns. N. Y. 229; 16 N. Y. Court of Appeals, 548; 16 Johns. N. Y., 121-136; 12 Wis. 544; 1 Wend., 487; 10 Eng. Com. Law (3 Barn. & Cres.), 235; 8 Wend. 492;

13 Wend. 644; 15 Wend. 557; 2 Cow. & Hill's Notes (Ed. 1839), 842, and cases cited; 15 Johns. N. Y. 432; 16 N. Y. 548; Rice vs. King, 7 Johns. 20; McKnight vs. Dunlap, 4 Barb. (N. Y.), 36.

SHERWOOD, C. J., delivered the opinion of the court.

The plaintiff had seventeen hogs stolen from him; search being made his son discovered thirteen of them in the possession of the defendants, at their packing-house. The whole number, however, had been sold to defendants, who were innocent purchasers for full value. Plaintiffs, on discovering that thirteen of his hogs were in possession of defendants, went to their packing house, found six of his hogs killed, but not cut up, and replevied them with damages for detention.

At the time plaintiff brought replevin, defendants had so cut up and otherwise disposed of the remaining eleven hogs, by packing them with others, that it was alike impossible to distinguish or replevy them.

As to *four* of the hogs, it does not appear from the agreed statement that plaintiff had any knowledge of their conversion when he brought his first suit. The present one he instituted before a justice of the peace, for the value of the eleven hogs, and was successful; but on appeal to the circuit court the defendants had judgment.

There is no doubt respecting the general correctness of the proposition expressed in the maxim: "*nemo debet bis vexari pro una et eadem causa.*"

This rule, however, is not of universal application. The origin and object of the rule were the prevention of the vexations incident to a multiplicity of suits, which the law, equally as much as equity, abhors.

The principle above asserted finds more familiar expression in the statement, that a party shall not split his cause of action.

Now, it is quite obvious, that such prohibition *pre-supposes knowledge* of the constituent elements of the cause of action sought to be unwarrantably divided. If this be true, and it be true also that the law does not require what is impossible, then

it must needs follow, that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ignorance of the full extent of the wrongs received or injuries done. Any other conclusion would be reached only through sanctioning the rankest injustice.

In *Farrington vs. Payne* (15 Johns. 432), the question is asked: "Suppose a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" Undoubtedly it would. But in such a case, where the owner is ignorant of the extent of his loss, would it not be far more outrageous to allow a recovery of *one* barrel, to prevent the recovery of the remaining nine hundred and ninety-nine?

This question will meet with an affirmative response in every honest heart.

Our views of the matter now before us, then, are, that as to the *four* hogs, of whose conversion plaintiff was ignorant when he brought his first suit, he is entitled to recover the value; and the law should have been thus declared. (*Risley vs. Squire*, 53 Barb. 280; *Freem. Judg.* § 241; *Bennett vs. Hood*, 1 Allen, 47.)

Judgment reversed and cause remanded. All the judges concur.

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STATE OF MISSOURI, Respondent, *vs.* SAMUEL ORR, Appellant.

1. *Criminal law—Felony—Acquittal of, how shown—Acquittal of co-defendant—Proof of improper, when.*—Proof of acquittal of a felony must be shown by the records and cannot be proved by parol testimony. And the acquittal of a co-defendant cannot be introduced in any shape for the benefit of one charged with commission of a felony.
2. *Criminal law—Evidence of guilt—Hypothesis if innocent.*—To establish the guilt of the prisoner the evidence must not only be consistent with a hypothesis of his guilt but inconsistent with that of his innocence.
3. *Evidence—Jury—Falsus in uno, etc.*—When the jury believe that a witness has knowingly testified falsely to any material fact in the trial, they are at liberty to reject his entire testimony.
4. *Instructions—Refusal of proper, when.*—Instructions which are argumentative or misleading, or the substance of which is embodied in others, are properly refused.

State v. Orr.

*Appeal from Lawrence County Circuit Court.**J. W. Patterson*, for Appellant.*J. L. Smith*, Atty Gen'l for Respondent, cited: State vs. Phillips, 24 Mo. 475.

NORTON, Judge, delivered the opinion of the court.

The defendant, jointly with R. H. Hart, Albert Cox and James Orr, was indicted in the circuit court of Christian county at its October term, 1875, for murder in the first degree, for killing one George W. Davis, in December, 1873. On the petition and affidavit of defendant, based upon the alleged prejudice of the inhabitants of Christian county, a change of venue was awarded to Barry county, from the circuit court of which county a subsequent change of venue was awarded to Lawrence county, on the ground of the alleged prejudice of the judge. At the March term, 1877, of the Lawrence circuit court, defendant was put upon his trial which resulted in a verdict of guilty.

Motions for a new trial and in arrest of judgment having been overruled, the cause is brought hereby appeal.

The counsel for appellant having neither filed an assignment of errors nor brief (although the case was advanced on the docket and set down for hearing at two different times), we have carefully looked through the record to discover whether any error was or was not committed by the trial court.

The evidence as disclosed by the record shows that Davis, the deceased, was, about dark, on the 11th of December, 1873, murdered, by being shot twice in the back of the head, once between the shoulders and once in the small of the back. He was killed in the hog lot a short distance—about fifty yards—from his residence, no person witnessing the tragedy but a little son of deceased, about seven years of age. who testified that about dark, after the deceased and himself had just finished feeding some fattening hogs, two men with long overcoats came up and asked his father if he had any feed to sell, who replied that he had; that the two men jumped over into the feed lot and were walking through the lot, one by his father's side and one behind him;

that they had gone but a little way when they shot his father several times and ran off towards the Wire road; that his father was dead when he got to him; that he saw no horses with the men. It was shown that Davis lived about one-half mile from the road leading from Springfield to Cassville (known and spoken of by the witnesses as the Wire road), and that the distance from Springfield to the residence of deceased was about eighteen miles. It was proven that about eleven o'clock of the day of the murder, Orr, the defendant, and Albert Cox left Springfield on horse-back, "Orr having on a blue great government overcoat," and a black gum overcoat tied to one of the saddles, and took the road known as the Wire road, leading to Cassville. One of them was riding a black or brown horse, and the other a white or gray. Orr and his companion, Cox, were traced by the evidence of a large number of witnesses along this road to within half a mile of Davis' house, at which point they were seen about sundown. A number of the witnesses met them and talked to Orr. To one he said he was going to Arkansas with a drove of stock, either horses or mules or both, that had, a short time before, passed ahead of him. To another he said he was going out hunting, and to another that he was going to a trial.

Both had overcoats on according to the evidence of some, and only one according to the evidence of others. It was also proven by one witness that about twenty minutes before seven o'clock, P. M., of the day of the killing, he met two horsemen on the Wire road riding rapidly toward Springfield about six miles from Davis' house; that he spoke to them without receiving any response; that one of them was riding a white or gray horse; the color of the other he could not tell as it was too dark. It was also shown that Orr and his companion, Cox, had along with them a bottle which contained spirits; that the bottle was a square bottle, larger at the top than it was at the bottom. The day after the killing several witnesses testified that two or three hundred yards from the scene of the murder, they found a place where two horses had been hitched in the woods, about five feet apart, and at one of the hitching places they found gray or white hairs which had been rubbed off one of the horses; that they

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also found, not far distant, another place where a halt had been made with the horses, and at this latter place they found a square bottle with a few drops of gin in it, answering the description of the bottle which had been seen in the possession of Orr and Cox on the Wire road. It was also shown that Orr returned to the saloon in Springfield, at which he was a bar tender, between nine and eleven o'clock of the night of the murder, and that when he took off his coat he pulled out three pistols. One witness testified that about one week before he heard of the killing of Davis he had a conversation with Orr, who told him that he, Orr, had a good thing to make a raise of four or five hundred dollars, that he wanted to kill a fellow; that he lived south, and that he wanted witness to go with him, saying they could ride to the place and back in a day, and all he wanted of witness was to hold the horses in the brush while he killed the man. Witness asked him what was the trouble, and the name of the man, some two or three times, when Orr said his name was Davis, and requested him to say nothing about it.

It was proven by several witnesses that previous to the killing Orr had but little money, and afterwards he was seen with considerable sums, and on one occasion flourished a roll of bills as large as a man's wrist, saying that he had blood money.

Defendant, upon being re-arrested, after escaping from the jail, remarked, in answer to the question why he did not get away? that he would have done so if they had met him at the place they had promised him, and that "by G-d, monied men had hired me to do this, and now that they must be running around at liberty, and I must lie here and suffer for it. I'll blow on the whole G-d d—n thing." No evidence was offered on the part of the defendant to account for his absence from Springfield on the day of the murder, nor tending to show the object of his ride on that day. A negro woman living at the house of deceased, and a daughter of Davis, were introduced by defendant, who testified that the two men at Davis' house on the evening of the murder appeared to be taller men than the defendant. One of them having on a soldier's blue overcoat, and the other a black.

The errors complained of as shown in the record are, first : that the court erred in excluding and admitting evidence ; and second : in giving and refusing instructions.

During the progress of the trial, defendant offered to prove by a witness that Hart, who was jointly indicted with defendant, had been tried and acquitted of the charge. The objection to this evidence was properly sustained by the court. If the fact of Hart's acquittal was admissible at all in the case, it could not be established in the way that defendant sought to establish it. The record of the trial and the verdict of judgment of acquittal could alone establish it. But the fact sought to be proved by the rejected evidence was not admissible at all. No rule of law is better settled than that the acquittal of one, jointly charged with another with the commission of a crime, cannot be used in the trial of the other in his favor any more than his conviction could be used on such trial to his prejudice. (*State vs. Phillips & Ross*, 24 Mo. 475.)

The objection to the introduction of the indictment on the part of the State, for the purpose of showing the time it was found, was properly overruled as there was evidence tending to show that the accused, upon being informed of it, left Springfield ; that the fact was communicated to defendant, and that he left Springfield in consequence thereof.

Although objection was made to all the instructions given on behalf of the State, none has been relied on here, and we have been unable to discover error in them.

The first instruction defines, in language repeatedly approved by this court, murder in the first degree.

The second instruction in substance tells the jury that it was not necessary for them to believe that defendant killed deceased with his own hand, if the evidence showed that he was present aiding, counselling, inciting or encouraging some other person in shooting and killing Davis.

The jury are told in the third instruction, that in determining a question of fact from circumstantial evidence alone, the hypothesis of defendant's guilt should flow naturally from the facts proved and be consistent with them ; that the evi-

dence should be such as to exclude, to a moral certainty, every supposition but that of defendant's guilt of the offense imputed to him; that it is not only necessary that the facts proved should be consistent with and point to the guilt of defendant, but they should be inconsistent with his innocence.

The fourth instruction defines "moral certainty" to be that degree of certainty which convinces and directs the understanding, and satisfies the reason and judgment of those who are to act conscientiously upon it.

In the fifth and sixth instructions the jury are told, that in determining the question of defendant's guilt or innocence, they should take into consideration the declarations and admissions of defendant given in evidence, as well as his flight from the charge.

In the seventh and eighth they were told that they were the judges of the credibility of the witnesses, and that if they believed any witness had sworn falsely in regard to any material fact they might disregard his evidence entirely.

The ninth contained the usual charge in reference to giving defendant the benefit of a reasonable doubt.

Three instructions were given on behalf of defendant and eight were refused. Two of the three instructions given were but repetitions of what was contained in the second instruction given for the State, while the third declared that "to the jury belonged the duty of weighing the evidence and judging the credibility of the witnesses. The degree of credit due a witness should be determined by his character and conduct, by his manner upon the witness stand, his relation to the controversy, his hopes and fears, his bias or impartiality, the reasonableness or otherwise of his statement, the strength or weakness of his recollection; and if you believe that any witness has knowingly testified falsely to any material fact upon the trial, you are at liberty to reject the whole of such witness' testimony." This instruction stated the law correctly as to the *scienter* of the witness, and may be considered as sufficiently supplementing that stated in instructions seven and eight, *supra*.

Of the eight instructions refused, the first asked the court to declare that the jury should find the defendant not guilty, unless they believed that either he or Cox and Hart jointly committed the murder. This instruction was properly refused; for under it, had it been given, although the jury might have believed that Cox did the killing and that defendant was present with him aiding and assisting him by his presence, yet they would have been bound to acquit him unless they believed that Hart was also participating with Cox in the commission of the crime. The second instruction was embraced in those which had been previously given. The third asked the court to declare that there was no evidence that Hart and James Orr had hired and procured defendant to kill Davis. The indictment contained no such charge, and it was not necessary to prove it. The fourth and sixth instructions were argumentative and misleading, and the principles announced in them had been previously given by the court in the instructions asked on behalf of the State and the defendant, divested of the argument contained in those refused. The declarations sought of the court in the seventh and eighth instructions were fully covered in the second instruction given for defendant and the sixth given for the State.

We have not been able to discover any such error in the action of the trial court as would warrant a reversal of the judgment.

The killing of Davis was a most foul and wicked murder, and all the circumstances developed in the evidence point unerringly to defendant as the murderer. One week previous to the murder he told the witness Schuler, who was talking of leaving Springfield because he could make nothing, and who was on the most intimate terms with defendant, that he "had a good thing to make a raise of four or five hundred dollars," that he wanted to kill a man who lived South, that the ride could be made from Springfield and back in a day, and that the name of the man to be killed was Davis, and that he wanted witness to go with him. He left Springfield on the morning of the murder, having on a blue government overcoat, riding a black or brown horse, in company with Cox, riding a gray or white horse, one of them having

a square gin bottle. The horses, with Orr as the recognized rider of one of them, were traced, by a number of witnesses, to within a quarter or half mile of Davis' house. A soldier's blue overcoat, according to the evidence of defendant's own witness, was worn by one of the men who murdered Davis.

A gray or white horse was hitched in the woods one-fourth of a mile from the scene of the murder, as shown by the hair found on the tree to which it had been tied, and a gin bottle was found where the two horses had been halted a short distance from where they were hitched, answering the description of the bottle Orr and Cox left Springfield with. After the murder, twenty minutes before seven o'clock, two men were met on the Wire road, six miles nearer Springfield than Davis' house, going towards Springfield, one riding a white and the other a dark horse. Orr appeared in the saloon at Springfield between seven and nine o'clock, according to the evidence of one witness, and between nine and ten o'clock, according to the evidence of the other, of the night of the murder, and took from his person three pistols, remarking to a man whom he had told in the morning that he was going out to a trial, that the trial did not come off; that he came by Newtown and stayed later than he thought. These facts connected with the further facts that the morning after the murder Orr returned to the livery stable keeper a revolver, with one or two barrels discharged, which had been taken from the drawer of the owner the morning before the murder, without his leave or knowledge, fully loaded; the fact of his saying he "had been hired to do this;" that before the murder he had but little money, and afterwards had considerable sums, remarking, on one occasion, that he had "blood money," and the entire failure of defendant to account for his absence from Springfield on that day, and the different stories told by him in regard to the object of his ride, would seem to sustain, fully, the conclusion reached by the jury.

The judgment is affirmed, the other judges concurring.

Massey, et al. v. Smith.

WM. MASSEY, *et al.*, Respondents, *vs.* JARED E. SMITH, Appellant.

1. *Register and Receivers at land office—Duplicate certificates of purchasers given by, prima facie evidence of purchase—Evidence in rebuttal.*—Duplicate certificates thereof given by registers and receivers of public lands are *prima facie* but not conclusive evidence of the payment of purchase money for such lands, and may be overthrown by the testimony.
2. *U. S. Land register—Purchase of public land by—Claim against one holding under by a person holding under later patent—Laches against the State—Receiver—Fraudulent combination—Equity.*—Under the statutes and the principles of law relating to that subject, United States registers in this State have no right to purchase public lands by entry at their offices, nor can laches be imputed to the State for failing to take action against persons holding under such purchaser, where nothing shows that the officers afterward connected with the land department knew anything of such purchase, nor was there anything on the records of the land office to apprise them of that fact. And on discovery of the purchase, regardless of the date of discovery, the State may annul the same, issue a new patent; and the one buying under the patent may hold regardless of the fact that he may have known of the former purchase by the register. And his rights are not affected by the fact that the land was also purchased by the receiver at the land office, where the latter purchased jointly with the Register, more especially when the circumstances show a fraudulent combination between the register and receiver in effecting their purchase.

Appeal from Dade County Circuit Court.

C. B. McAfee, for Appellant, contended that this case at bar was not within the reasoning of the court in Wickersham vs. Woodbeck, 57 Mo. 59.

Bray & Cravens, for Respondents cited: Wickersham vs. Woodbeck, 57 Mo. 59.

HENRY, Judge, delivered the opinion of the court.

On the 5th of June, 1857, Nicholas F. and James I. Jones were Receiver and Register of the State Land Office at Springfield, Missouri. Plaintiffs allege in their petition that on that day said Joneses purchased at said Land Office, § 12 of township No. 31 of Range 29, lying in Dade county, and that plaintiffs—some of them by purchase, and others by descent—own the interest of said Joneses in said land; that no patent ever issued to plaintiffs or said Joneses; that after they became owners, as aforesaid, plaintiff Massey and the ancestors and grantors of

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his co-plaintiffs, presented to defendant, then register of lands for the State, the certificate of purchase and payment issued by said receiver and register to N. F. and J. I. Jones, and demanded a patent for the land, but it was not issued, and that afterward defendant, while register as aforesaid, and with knowledge that said land had been previously sold to the Joneses, and that the certificate of purchase and payment were then held by said Massey, intending to defraud plaintiffs, fraudulently caused a patent for said land to be issued to himself on the 23d day of August, 1867, and plaintiffs ask that he be declared and held as a trustee for them, etc. Defendant in his answer denies all of the foregoing allegations, except that he procured a patent for the said land, and alleges that at the date of his purchase, said land was designated on the books and records of the State as vacant and unsold, and that there was at that time no entry of record or other matter upon the books or records of the State showing or indicating that the Joneses had purchased; that they never reported such sale to the State, or paid the whole or any part of the purchase money.

The court, by its decree, found that at the date of their alleged purchase, said Nicholas F. and James I. Jones were respectively receiver and register of the State Land Office, at Springfield, and also found for plaintiffs on all the issues made by the pleadings, and made a decree as prayed for in plaintiff's petition. In order that the views of this court in this case may be fully understood, it is necessary to state the substance of the testimony on the only issue of fact which we propose to consider—that is, as to the payment of the purchase money for the land in controversy by the Joneses. On the other issues, we would not be inclined to disturb the finding of the court.

The following are copies of the duplicates of the certificates of purchase and payment issued to Nicholas and James Jones:

“No. 660. State Land Office at Springfield, Mo., June 5th, 1857. Received of James and Nicholas Jones, of Greene county, Mo., eight hundred dollars, being in full for sec. 12, T. 31, R. 29, containing 640 acres, at \$1.25 per acre. Signed, N. Fain Jones, Receiver.”

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"I do hereby certify that I have sold to James and Nicholas Jones the sec. 12, T. 31, R. 29, as the foregoing receipt specifies, and that the foregoing is the receiver's receipt for the purchase of the same. Signed, James S. Jones, Register."

Conceding that the duplicate certificates are *prima facie* evidence of the payment of the purchase money by the Joneses, they are not conclusive of that fact, and the defendant had the right, and it devolved upon him, to disprove the *prima facie* case made by the duplicates.

On this issue the evidence offered by defendant, which is uncontradicted, is, that in the report of the sales of lands at the Springfield land office, from the 1st day of April, 1857, to the 30th day of September, 1857, a period of time embracing the date of the alleged sale to the Joneses, that sale is not reported, and that report was by Jas. I. Jones, Register, certified to as correct on the 1st day of October, 1857. In that report, duplicate No. 660 is returned as the number of a duplicate issued to Nicholas F. and James I. Jones for 40 acres of sec. No. 10, T. No. 31, of R. No. 29. Sec. 18 of the Revised Statutes of 1855, p. 987, provides that "it shall be the duty of the register to make quarterly reports of all lands sold under the provisions of this act, at his office, to the register of lands at the city of Jefferson, describing said lands by ranges, townships, sections or parts of sections, the number of acres, by whom entered and the amount paid for the same, and the said register of lands shall record the same in a book to be kept for that purpose." As, therefore, no report of said sale was ever made by the register, and he was required to make quarterly reports of sales made, we conclude that the statement in defendant's answer is true; that at the date of his purchase there was nothing on the books or records in the register's office indicating that the land in controversy had been sold.

This taken in connection with other circumstances, well calculated to excite suspicion in regard to the good faith of the register and receiver, in that transaction, we think, rebutted the *prima facie* case made by the plaintiffs as to the payment of the purchase money. In the quarterly report embracing the time of

their alleged purchase, is a duplicate of the identical number of that upon which this suit is based, and for an entirely different tract of land.

The receiver, it seems, was well known as Nicholas F. Jones, yet he signs the duplicates as N. Fain Jones. The purchasers as named in the duplicates are Nicholas Jones and James Jones. Why drop the initial of the middle names? Why did the receiver sign the duplicate as N. Fain Jones? These facts themselves would not sustain a charge of fraud, but taken in connection with the omission of the register, James I. Jones, to report the sale, which by his official oath he was bound to do, prove that there was something wrong in the transaction—that they themselves thought so, and were endeavoring “to cover their tracks.” The purchase money, it is evident, was not paid by them within the quarter ending the 30th day of September, 1857. There was no attempt on the part of the plaintiffs to prove that it was paid at any other time, and it is reasonable to suppose that if by mistake it was not reported when it should have been, and was afterwards reported and paid for, there would be something on the plats, books, or other records in the land office, to show that fact.

We are satisfied from the evidence that the money was not paid, and should have had no hesitancy so to find if the Circuit Court had not found otherwise.

If they did not pay the purchase money, they have no right to the land as against the State, and of course no equity against a purchaser from the State, and those who claim under them have no other right than theirs.

The court below found that defendant, Smith, had notice of plaintiff's claim, and of the nature of their claim, but that knowledge cannot invalidate his purchase, if, in fact, the Joneses had not paid the purchase money for the land.

But even if the Joneses had bought and paid for the land, the question occurs, had the register of lands any right to purchase land for sale at the land office of which he was register.

An agent to sell lands has no right to buy them. His principal would not be bound by such a sale. “One cannot at the same time take upon himself incompatible duties and characters. Thus,

a person cannot act as agent in buying for another goods belonging to himself, and at the sale made for his principal he cannot become the buyer." (Sto. Ag., § 9, 8th edition.)

Does this familiar principle apply to the class of public officers to which the Joneses belonged? In 1843, Hon. John Nelson, then Attorney-General of the United States, in an official communication to the Secretary of the Treasury, Hon. John C. Spencer, in answer to a communication from the latter, requesting his opinion "whether it is competent for the Treasury Department, or for the President, by regulation, to prohibit registers and receivers of the United States Land Offices from purchasing or entering public lands," distinguishes between registers and receivers, as did also the Act of Congress as to their right to purchase lands of the government at the office of which they were register and receiver. "This class of officers (speaking of registers), it is quite clear, both upon principle and authority, and by the express terms of the law which created them, cannot properly be concerned in the purchase of the public lands." Again he says: "Receivers are not the agents of the government, by whom the sales of public lands are effected." It will be observed that the Attorney-General places the inability of registers to purchase, not upon the express provisions of the act of Congress alone, but also upon the common law doctrine of agency.

In the case of *The People vs. The Township Board of Overysse* (11 Mich. 223), four of the ten relators, who took a contract to build piers, were members of the board of free-holders, organized under the act for the purpose therein mentioned, and that let the contract on behalf of the public. After stating that an agent could not act for himself and his principal, in the same transaction, Manning, J., who delivered the opinion of the court, says: "All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public, to protect, advance and promote its interests, and not their own. And a greater necessity exists, than in private life, for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes

exposed are stronger, and the risk of detection and exposure is less."

Public policy especially demands the application of the rule to the class of officers to which the Joneses belonged.

The government holds a vast public domain, which it is the policy to settle with an industrious and enterprising population, and for that purpose to sell them the lands at the low prices placed upon them by the government. If officers entrusted with the sale were permitted to purchase these lands by entry at their own offices, it would bring them in competition with those who desire to purchase, to make homes for themselves and their families, and tempt these officers to engage in speculative entries, and to take undue advantages of the very class of men for which our acts of Congress and of the General Assembly have shown a decided partiality.

It will not be asked in this State how advantages could be taken by the registers of the Land Office. Many of our people have sad experience on this subject, and could tell not only how it might be, but how it has been done.

There is no provision of the statutes of this State, creating said offices and officers, which gives to the register the right to buy lands at his office; and some of the provisions of the law in force at the date of the alleged purchase by the Joneses are incompatible with the existence of any such right.

The 14th section of the act (Rev. Stat. 1865) provides that where two or more persons claim pre-emptions on the same land, the register and receiver are to decide between them.

If permitted to purchase, a contingency might arise, under the act, in which he might sit as the trier of a fact in his own case.

We are satisfied that if a purchase had been made, and the purchase money paid by the Joneses, as alleged, it would not have been binding on the State.

Nor can laches be imputed to the State for not avoiding the sale sooner than it was done by the sale to the defendant.

If laches are in any case imputable to the State, the facts in the case at bar repel the implication, for it nowhere appears that any officer of the State, connected with her land department,

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knew of such purchase, nor was there anything of record in the Land Office to apprise the officers of the State, either in the Land or any other department, that said land has been purchased or paid for by the Joneses. So that if they bought and paid for the land, the State could avoid the sale, and has so done by the sale and patent to defendant. If the State could avoid the sale to the Joneses, and has done it by the sale to Smith, then whether defendant had or had not knowledge of the previous purchase and payment, he had a right to purchase the land from the State, and plaintiffs have no equity which can be enforced against him. That the receiver had a right to purchase does not help the plaintiff's case. It was not a sale of part of a section to one, and another part to the other. It was a sale of the whole section to them jointly, and there are so many circumstances indicating the receiver's complicity with the Register in a fraud upon the State, that a court of equity will not go out of the beaten paths to seek a remedy for him.

In the case of the *People vs. The Township of Overysse*, cited above, the judge who delivered the opinion of the court, holds the following language on this subject applicable to the case at bar :

"We think it no exception to the rule we have stated, that all the contractors were not members of the board of free-holders, or that those who were members were a minority of the board. The rule would not amount to much, if it could be evaded in any such way. It might almost as well not exist, as to exist with such an exception. The public would reap little or no benefit from it."

With the concurrence of the other judges the judgment is reversed and the petition dismissed. Sherwood, C. J., not sitting.

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DELIA THOMAS, Defendant in Error, *vs.* J. S. THOMAS, Plaintiff in Error.

1. *Divorce—Decree in motion to set aside—Record.*—The Supreme Court will not examine an appeal from a decree in a divorce suit where the record fails to show that a motion to set aside the decree was disposed of.

Thomas v. Thomas.

Error to Joplin County Court of Common Pleas.

Ewing, Smith & Pope, for Plaintiff in Error.

T. J. Howell, with Waldo P. Johnson, for Defendant in Error.

HOUGH, Judge, delivered the opinion of the court.

This was a suit for divorce, instituted in the Joplin court of common pleas. At the June term, 1874, a decree of divorce *a vinculo matrimonii* was rendered in favor of the complainant, and at the same term the defendant filed a motion to set that decree aside. It does not appear from the record that this motion was ever disposed of. The present writ of error seems to have been sued out prematurely.

Until the motion to set aside the decree was overruled by the court there was no judgment from which an appeal could be taken, or which could be reviewed on writ of error.

The writ must therefore be dismissed. All the judges concur.

END OF OCTOBER TERM, 1876, AT JEFFERSON CITY.